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No. 75-182

In the Supreme Court of the United States

OCTOBER TERM, 1975

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

JERSEY CENTRAL POWER & LIGHT CO.; LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DECISIONS BELOW

The opinions of the panel of the Court of Appeals are reported at 508 F. 2d 687. (App. 19, *infra*). The decision of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered January 30, 1975, and a petition for rehearing was denied March 4, 1975. On May 27, 1975, Mr. Justice

Brennan by order extended the time for filing a petition for a writ of certiorari to and including August 1, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether layoffs made pursuant to a company-wide seniority system which eliminate a vastly greater proportion of minority group employees than of other employees violate Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, when the disproportionate impact results directly from the employer's post-1965 unlawfully discriminatory hiring practices which prevented minority group employees from accruing sufficient seniority to withstand the layoffs.

STATUTES INVOLVED

This action involves the interpretation of Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (1970, Supp. II) (78 Stat. 253, as amended by 86 Stat. 103).

Section 703(a) of Title VII [42 U.S.C. 2000e–2(a)] provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

> otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c) of Title VII [42 U.S.C. 2000e–2(c)] provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership, or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(h) of Title VII [42 U.S.C. 2000e–2(h)] provides in pertinent part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity

> or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *.

STATEMENT OF THE CASE

Jersey Central Power and Light Co. is a public utility which generates and distributes electrical power to approximately 43% of New Jersey. At the time the complaint in this case was filed, it employed 3844 workers, three-quarters of whom (2877) were covered by a collective bargaining agreement between the company and seven locals of the International Brotherhood of Electrical Workers (IBEW).

On July 22, 1974, Jersey Central filed a complaint for declaratory judgment, naming the IBEW locals, the Equal Employment Opportunity Commission, the General Services Administration, the Office of Federal Contract Compliance, and the New Jersey Division of Civil Rights as defendants. The complaint alleged that economic conditions required Jersey Central to cut labor costs. Since the company proposed to accomplish the necessary cuts by laying off employees, it asked the district court to declare and determine its possibly inconsistent obligations under its collective bargaining agreement, on the one hand, and Title VII of the Civil Rights Act of 1964, Executive Order 11246, and a conciliation agreement signed by the company, the unions, and the EEOC in December 1973, on the other.

Under the collective bargaining agreement, layoffs of employees in the bargaining unit "shall be made in order of seniority" and "[n]o senior employee shall be laid off as long as any work which he can reasonably be expected to do is being performed by an employee junior in point of service." ¶3.2(a).) Bargaining unit employees with ten or more years of company service are wholly exempt from layoff. ¶3.2(c).)

During the proceedings below the company provided information which indicated that layoffs based on seniority would eliminate a substantial number of blacks and other minority group members, especially those hired as part of the company's affirmative action programs.[1] Subsequently, at oral argument before the court of appeals, counsel for Jersey Central disclosed the effects of the actual layoffs.[2] As of November 22,

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[1] According to statistics provided by the company as an attachment to the affidavit of a company officer, minority-group employment constituted approximately 1% of Jersey Central's workforce between 1966 and 1968. Thereafter the number of minority group employees increased as follows:

	Black	SSA	Other
Dec. 31, 1969	81 (2.2%)	12 (0.3%)	4 (0.03%)
Dec. 31, 1970	87 (2.3)	13 (0.3)	4 (0.03)
Jan. 22, 1972	101 (2.6)	16 (0.4)	4 (0.03)
Dec. 31, 1972	130 (3.6)	23 (0.6)	4 (0.03)
Dec. 31, 1973	181 (4.8)	29 (0.8)	5 (0.03)
July 27, 1974	211 (5.5)	37 (1.0)	9 (0.03)

Derived from Appendix D to affidavit of James R. Leva, dated September 5, 1974. (SSA indicates Spanish-speaking Americans.)

[2] The company's statistics did not distinguish between bargaining unit employees and other employees.

1974, the company had laid off 292 employees, 83 of whom (28.4%) were blacks or members of other minority groups.[3] The layoffs therefore lowered the number of minority group workers employed by Jersey Central by almost one-third (32.2%) but reduced non-minority employment by only 5.8%.[4] Stated another way, minority group employment as a percentage of total employment fell from 6.7% before the layoffs to 4.9% after the layoffs;[5] non-minority group employment rose correspondingly, from 93.3% to 95.1%. All of the bargaining unit employees who were laid off—both minority group and others—had apparently been hired after 1971. (*See* Appendix A to Leva affidavit, dated September 5, 1974).

Based on somewhat similar (but preliminary) data the company moved for summary judgment in the district court. Over the objections of the EEOC that summary judgment was premature in the absence of discovery and prior to the joinder of issue,[6] the district court issued partial summary judgment. The court held that, as a matter of contract law, the seniority provisions of the collective bargaining agreement could not be used in a manner which would frustrate

[3] *I.e.*, 83 of the 258 minority group employees employed immediately before the layoffs. (Calculated from figures appearing in Appendix D to Leva affidavit and in 508 F. 2d at 698 n. 29, App. 35.)

[4] *I.e.*, 209 of the 3586 non-minority group employees employed immediately before the layoffs. (Calculated from figures appearing in Appendix D to Leva affidavit and in 508 F. 2d at 698 n. 29; App. at 35.

[5] *See* 508 F. 2d at 698 n. 29; App. at 35.

[6] The unions had filed their joint answer at the time of the company's motion; the other defendants had not.

the affirmative action provisions of the later-executed tripartite conciliation agreement. The court found that "to the extent that application of the seniority clause would substantially reduce the relative percentages of those whose hiring is the purpose of the EEOC agreement," the seniority clause in the collective bargaining agreement frustrated the conciliation agreement. The court therefore ordered the parties to devise a system for laying off employees which would insure that minority employees and female employees would constitute approximately the same proportion of the total workforce after the layoffs as they did before. The district judge expressly declined to rule whether layoffs conducted solely by seniority would violate Title VII.

On an interlocutory appeal by the unions, the court of appeals reversed. The panel unanimously held that the conciliation agreement was directed at new hires and did not cover layoffs. The two agreements, consequently, were not in conflict "either by their express terms or by implication." (App. 48–49; 508 F. 2d at 704). We do not here question that holding.

Although the EEOC had argued before the court of appeals that the question of a possible violation of Title VII was not ripe for decision and could not be resolved without development of a fuller record, a majority of the panel (Judges Garth and Hunter) undertook to consider the issue. The majority held that, as a consequence of § 703(h) of Title VII, 42 U.S.C. 2000e–2(h), layoffs conducted in accordance with a facially neutral company-wide seniority system which "was neither designed nor intended to disguise

discriminatory practices" could not violate Title VII. (App. 55; 508 F. 2d at 706–707 n. 54). The majority found irrelevant *all* evidence of past hiring discrimination, even if the seniority system carried forward the effects of discrimination occurring after the effective date of Title VII. The majority specifically stated that "proofs of this nature are without probative value." (App. 54; 508 F. 2d at 706).

ARGUMENT

The issue presented here by virtue of the panel majority's analysis of Title VII—the extent to which a company-wide seniority system justifies elimination of minority-group employees who lack seniority because of their employer's post-Title VII unlawful hiring practices—is the most pressing problem in employment discrimination law, given current economic conditions. The decision below allows employers who unlawfully refused to hire minority group members after the enactment of Title VII to "treat the recently hired and governmentally twice emancipated Blacks as persons who once again [have] to go to the foot of the line." *Rowe* v. *General Motors Corp.* 457 F. 2d 348, 358 (C.A. 5). Since the decision below thus permits the eradication of many of the gains made by minorities during the first decade of Title VII, we urge that it be reviewed by this Court. This Court has itself noted, that in the Civil Rights Act of 1964, "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.' " *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47.

Review is particularly appropriate since the panel majority, *sua sponte,* reached for the Title VII issue after the district court had properly declined to do so and after the E.E.O.C. had suggested that the action, insofar as it involved Title VII, be remanded for full development of the relevant facts.[7] The panel decision therefore constitutes a ruling that no matter how flagrant the employer's violation of Title VII, no matter how aware the unions were of that unlawful discrimination when they negotiated their collective bargaining agreement, no matter how long the newly hired blacks and women may have been in the labor market, but excluded from employment, company-wide seniority may govern layoffs unless negotiated with a specific intent to discriminate.

Even on the present record, the facts of this case demonstrate the eroding effect the decision below will have on the progress made under Title VII—prior to the current recession—in creating job opportunities for members of minority groups. The evidence indicates that as late as January 1, 1970—more than five years after enactment of Title VII—only 2.3% of the company's employees were members of minority groups, a disproportionately low number which, under prevailing case law, indicates a *prima facie* case of

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[7] If the Court should deem further development of the facts necessary for consideration of the issue, it would be appropriate for the Court summarily to vacate so much of the judgment below as is based on the panel majority's discussion of Title VII (in parts III B. and IV of the majority's opinion), so as to permit the development of a full record in the district court.

hiring discrimination.[8] In the four years after 1970, and particularly after the filing of the administrative charge which led to the Commission's finding of reasonable cause and to negotiation of the conciliation agreement, the number of minority-group individuals employed by Jersey Central tripled; even then, they constituted less than 7% of the workforce. The 1974 layoffs eliminated all but about twelve of the minority-group employees hired in 1973 and 1974. Like their counterparts throughout this country's labor force—where black males, for example, have lost jobs at a rate double that of their percentage in the labor force[9]—Jersey Central's minority group employees bore the brunt of the layoffs, constituting 28.4% of those who lost their jobs. The majority ruling therefore demands review.

[8] *Erie Human Relations Commission* v. *Tullio*, 493 F. 2d 371, 373–74 (C.A. 3); *United States* v. *Chesapeake & Ohio Ry. Co.*, 471 F. 2d 582, 586 (C.A. 4), certiorari denied, 411 U.S. 939; *United States* v. *Hayes International Corp.*, 456 F. 2d 112, 120 (C.A. 5); *Carter* v. *Gallagher*, 452 F. 2d 315, 323 (C.A. 8), certiorari denied, 406 U.S. 950; *United States* v. *Ironworks Local 86*, 443 F. 2d 544, 550 (C.A. 9), certiorari denied, 404 U.S. 984; *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245, 247 (C.A. 10), certiorari denied, 401 U.S. 954.

Jersey Central's headquarters are located in Morristown N.J., which has a minority population of approximately 23.4%. Four facilities are located in or within five miles of Asbury Park, with a minority population of 43.6%. The company also has facilities, among others, in Lakewood (minority population 20.1%), Red Bank (25.8%), and within eight miles of New Brunswick (24.1%). *See* U.S. Dept. of Commerce, GENERAL POPULATION STATISTICS (1970)—NEW JERSEY, #PC(1) B32, N.J., Table 16.

[9] Shiskin [Commissioner, Bureau of Labor Statistics], *Memorandum for the Secretary* [*of Labor*], Table 2 (April 15, 1975).

We contend that Jersey Central's layoff system must be analyzed in the same manner as all other employment practices in order to determine whether it violates Title VII. In such an analysis, the consequences, not the intent, of an employer's actions determine whether a particular employment practice is unlawful. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, where this Court said that Title VII proscribes "not only overt discrimination but also practices that are fair in form but discriminatory in operation."

We believe that Congress did not intend to permit the unlawful refusal to hire blacks and other minorities after the effective date of Title VII to serve as the basis for depriving blacks of the employment opportunities they had finally obtained when such unlawful conduct ceased. The court of appeals reached a contrary conclusion. Its opinion rests primarily on what it deems to be the intent of Congress as expressed in §703 (h) of Title VII and the 1964 Senate "debate" which discussed the effect of the proposed legislation on seniority rights. We believe that the majority misapplies the "debate".[10] In 1964, the focus was on the

[10] The legislative history which the court of appeals uses as the anchor for its analysis is unusual. It is not a committee report; neither is it floor debate. Rather it consists of three memoranda—one of which was prepared by the Department of Justice—which were introduced into the CONGRESSIONAL RECORD without debate or elaboration by Senators Clark and Case. *See* 110 CONG. REC. 7207; 7212–15; 7216–17 (1964). All three were introduced into the RECORD several weeks before § 703(h) was submitted as part of a compromise substitute for the original bill. There was no discussion of § 703(h) itself,

effect of the proposed Title VII on preexisting seniority rights, *i.e.*, rights which had accrued when, under then existing concepts, discrimination in employment was *not* unlawful. The remarks did not address themselves to the situation which we believe this case may present where, from the evidence, it appears that for years *after* the passage of the 1964 act, an employer discriminated against minorities *unlawfully,* so that a seniority system, even though company-wide, necessarily had the effect of perpetuating *unlawful* post-1965 discrimination. It is our position that, whatever may be the situation with respect to pre-1965 discrimination, a seniority system which perpetuates post-1965 unlawful discrimination cannot, by its very nature, be deemed *bona fide.* There is nothing in the 1964 debate which would indicate that Congress, having outlawed discrimination in employment, intended to provide that those groups who had been deprived of the opportunity for employment *after* the passage of Title VII, should continue indefinitely to bear the brunt of that unlawful discrimination. *See* 43 GEO. WASH. L. R. 947 (1975).

The panel majority's analysis is contrary to the weight of authority, which has consistently construed § 703(h) narrowly. Beginning with the leading cases of *Local 189, United Papermakers and Paperworkers*

except for a paraphrase by Senator Dirksen, *see id.*, at 12818–19, and a statement by Senator Humphrey that § 703(h) "does not narrow application of the Title, but merely clarifies its present intent and effect." *Id.* at 12723. The majority opinion does not mention that the House had defeated an amendment which would have made Title VII inapplicable to employment practices made pursuant to "a seniority system." *See* 110 CONG. REC. 2727–28 (1964).

v. *United States,* 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919, and *Quarles* v. *Philip Morris, Inc.,* 279 F. Supp. 505 (E.D. Va.), courts have held that seniority systems which incorporate past discrimination and are later used to make employment decisions which have a discriminatory impact cannot be *bona fide.* As Judge Butzner noted in *Quarles*:

> The purpose of the act is to eliminate racial discrimination. Obviously one characteristic of a *bona fide* seniority system must be lack of discrimination.
>
> . . . [A] departmental seniority system that has its genesis in racial discrimination is not a *bona fide* seniority system.

Id. at 517. And *see Rogers* v. *International Paper Co.,* 510 F. 2d 1340, 1354 (C.A. 8), petition for certiorari filed, No. 74–1446, May 17, 1975.[11] In enacting the 1972 amendments to Title VII, Congress accepted the judiciary's gloss on Title VII and § 703(h), specifically citing with approval *Local 189* and *Quarles* and the leading commentators on seniority systems and Title VII.[12] SENATE REP. No. 92–415, 92d Cong., 1st Sess.

[11] In *Rogers* v. *International Paper Co.,* 510 F. 2d 1340, 1354 (C.A. 8), the court stated:

"Under Title VII, seniority and promotion policies have been frequently scrutinized by courts, despite an exemption for '*bona fide* seniority or merit system[s],' * * * for they can be subtle forms of discrimination which perpetuate discriminatory patterns of the past."

See also, United States v. *Chesapeake & Ohio Ry. Co.,* 471 F. 2d 582, 587–88 (C.A. 4), certiorari denied, 411 U.S. 939.

[12] Cooper and Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598 (1969).

(Oct. 28, 1971) at 5; H.R. REP. No. 92-238, 92d Cong., 1st Sess. (June 2, 1971) at 8. *See,* similarly, "Section-by-Section Analysis of H.R. 1746 (Equal Employment Opportunity Act of 1972)," 118 CONG. REC. 7166 (1972).[13]

In its opinion the panel majority disregards the 1972 legislative history entirely. It distinguishes the case law on which the 1972 legislative history is founded on the ground that those cases involved departmental seniority systems. The philosophy underlying those decisions cannot be so lightly disregarded. The decisions which Congress accepted clearly recognize that a seniority system, founded on discrimination, cannot be *bona fide*. The system here, even though company-wide, is founded on unlawful post-1965 discrimination and cannot be *bona fide*.

This case therefore does not involve the more difficult matters raised by the 1964 Senate debate—the impact of Title VII on seniority which accrued prior to 1965—since the discrimination which the seniority system here incorporates occurred in the years after Title VII took effect and no employee hired before 1965 is affected. These factors not only distinguish this case from the statements made in 1964 but also from the only other appellate decision interpreting Title VII in the context of layoffs which eliminate a vastly

[13] The joint "Section-by-Section Analysis" states:

"In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."

118 CONG. REC. 7166 (1972).

disproportionate number of minority employees, *Watkins* v. *United Steel Workers of America, Local No. 2369,* —— F. 2d —— (C.A. 5, No. 74-2604, July 16, 1975). *Watkins* involved layoffs of all employees having seniority dates after 1951, when the black employees who were laid off would have been seven years old or younger. The court emphasized that the employer had not discriminated since the effective date of Title VII. The court therefore did not consider the problem of post-Act discrimination involved in the present case. Its holding, therefore, has no bearing on the issue presented here.[14]

[14] Two other court of appeals decisions are related to the issue presented here. Neither, however, is directly on point and neither discusses the distinction between pre-1965 and post-1965 seniority rights or between pre- and post-Act discrimination. In *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309 (C.A. 7), petition for certiorari filed, No. 74-1064, Feb. 24, 1975, the court, reviewing a *post-trial* decision in a non-class action—where the hiring discrimination had occurred *prior* to the effective date of Title VII—held only that "[o]n balance, we think Wisconsin Steel's seniority system is racially neutral, and *does not* perpetuate the discrimination of the past." 502 F. 2d at 1320; emphasis supplied. In *Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398 (C.A. 5), certiorari granted, No. 74-728, March 25, 1975, the court in reviewing a decision in a case not involving layoffs, held that § 703(h) is a limitation on the relief which a court can give if it finds a violation of Title VII. Neither the trial court nor the court of appeals made any determination as to whether the system involved there was *bona fide*. The court of appeals merely held that "constructive" seniority could not be created by a court in order to slot an applicant who was discriminatorily denied employment into a seniority system assumed to be *bona fide*. While we do not believe *Franks* to be relevant to the issue presented here, we, with the Solicitor General, have filed a brief in this

Not only does the panel majority opinion fail to distinguish between seniority which accrued prior to 1965 and seniority which accrued thereafter, or between discrimination which occurred prior to 1965, and *unlawful* post-1965 discrimination, it may be read to hold irrelevant all evidence that some or all of the minority group employees laid off may themselves have been the victims of Jersey Central's post-1965 hiring discrimination. By sanctioning the use of company seniority for layoffs under all circumstances—except where it is being willfully used to disguise discrimination—the majority appears to authorize the layoff of persons who applied to the company but were *unlawfully* rejected, or who were in the labor market and would have applied but for Jersey Central's reputation as a discriminatory employer. Thus, even minority group employees who themselves were prevented from acquiring seniority by the company's unlawful post-1965 hiring practices would be victimized a second time by the seniority system. *See* Note, *Last Hired, First Fired Layoffs and Title VII,* 88 HARV. L. REV. 1544 (1975).

CONCLUSION

For the reasons stated, we urge the granting of the petition to review so much of the judgment of the court of appeals as holds that the use of a company-wide seniority system as a method for determining

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Court to argue that we believe it to have been wrongly decided. *See also Meadows* v. *Ford Motor Co.*, 510 F. 2d 939 (C.A. 6). (C.A. 6), petition for certiorari filed, No. 74-1349, April 25, 1975.

layoffs can never constitute a violation of Title VII unless willfully used to disguise discrimination.

Respectfully submitted.

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AUGUST, 1975.

I authorize the filing of this petition.

ROBERT H. BORK,
Solicitor General.

APPENDIX

APPENDIX

Opinions and Judgment of the United States Court of Appeals for the Third Circuit

Before Van Dusen, Hunter and Garth, Circuit Judges

GARTH, Circuit Judge: This case presents to us, in an unusual procedural context, the difficult question of determining which of two alledgedly conflicting contracts is to dictate the plaintiff employer's course of conduct. We must resolve whether in reducing a company's work force an employer is obligated to adhere to collective bargaining agreement provisions requiring layoffs in reverse order of seniority, or whether the employer is obligated to implement the provisions of a conciliation agreement made with the Equal Employment Opportunity Commission (EEOC) to retain among its employees a larger proportion of minority group and female workers. It is agreed among the parties that layoffs in reverse order of seniority will have a disproportionate effect upon minority group and female workers, as they are the most recently hired employees. Despite this consequence, we reverse the judgment of the district court and hold that the provisions of the collective bargaining agreement must govern in this procedural context.

I.A. Procedural History

On July 18, 1974, Jersey Central Power & Light Company ("Company"), the employer, brought the

instant action pursuant to 28 U.S.C. §§ 2201, 2202 [1] in the District Court for the District of New Jersey. The Company sought a judgment declaring its rights and obligations under: (1) a collective bargaining agreement between the Company and the Unions,[2] and (2) a conciliation agreement among the EEOC, the Company and the Unions.[3] Named as defendants in the action for declaratory judgment were the Unions, the EEOC, the United States Office of Federal Contract Compliance (OFCC), the United States General Services Administration (GSA), and the New Jersey Division of Civil Rights.[4] The Company presented itself in this litigation as a "neutral" party, taking no posi-

[1] 28 U.S.C. § 2201 provides:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 2202 provides:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

[2] The Unions are Locals 327, 749, 1289, 1298, 1303, 1309 and 1314 of the International Brotherhood of Electrical Workers.

[3] The Company also sought a declaratory judgment with respect to its obligations under Executive Order 11,246, 3 C.F.R. 169 (1974), 42 U.S.C. § 2000e, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The district court, however, did not base its order on either the executive order or the statute.

[4] The New Jersey Division of Civil Rights failed to file a response after it had been served with the complaint. It has also failed to participate in any stage of this litigation.

GSA and OFCC were included as defendants in light of the Company's status as a federal contractor. As a federal contractor the Company is subject to the equal employment opportunity requirements of Executive Order 11,246, which are enforced by GSA and OFCC. In denying GSA's and OFCC's motion to dismiss as to them and in promulgating its order of September 24, 1974, the district court specifically refused to interpret the effect of Executive Order 11,246. The court did indicate that its order "in no way restricts these defendants [GSA and OFCC] in pursuit of their obligations pursuant to Executive Order 11,246".

tion as to which of the two contracts must govern the manner by which a substantial cutback in employment would be effectuated.[5] In this posture, the Company sought guidance from the district court, asserting that economic circumstances required it to lay off substantial numbers of employees. The Company alleged that it could not determine the specific individuals to be affected until the court declared which of the two agreements was to govern the layoff procedure.

Contending that it faced multiple suits for back pay, irreparable injury to itself and to the public, and severe financial inroads on its resources, on August 23, 1974, the Company moved for an order requiring the defendants to show cause why summary judgment should not be granted "declaring the respective rights of the parties and whether plaintiff [the Company] violated its collective bargaining agreement with [the Union] defendants * * * and the Conciliation Agree-

[5] Although the Company characterizes its position as that of a "neutral" party, in substance the Company has taken adverse (albeit inconsistent) positions to those advanced by the Unions and the EEOC. To each defendant, the Company has implicitly asserted that in respect to layoffs it is obligated to adhere to its contract with the other. While inconsistent, the Company's position sets forth the requisite adverse legal interests to present a justiciable case or controversy. *See* II., *infra.*

ment entered into on December 3, 1973 by the layoff * * * of [designated] employees. * * *"[6]

On September 5, 1974, the return date of the order to show cause, defendants GSA and OFCC moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12 for failure of the complaint to state a claim upon which relief could be granted and for lack of subject matter jurisdiction in the federal district court. Defendant EEOC, in turn, did not contest the district court's jurisdiction but instead opposed the Company's motion on the grounds that summary judgment could not be granted because material facts were in dispute.[7] After the submission of briefs and affidavits, the district court held a hearing on motions of the Company and GSA and OFCC, at the conclusion of

[6] The Company moved for an order to show cause after the Unions had filed a joint answer (filed July 25, 1974) but prior to the filing of answers by the Government defendants GSA and OFCC (filed September 25, 1974) and EEOC (filed October 3, 1974).

[7] EEOC listed the following as necessary material facts:

* * * * *

"5. This office does not presently have information as to whether any of the employees who will be laid off or who have already been laid off were the actual victims of past discriminatory practices of plaintiff which the Conciliation Agreement seeks to remedy.

* * * * *

"7. It is impossible to determine from the report submitted by plaintiff pursuant to its obligations under the Conciliation Agreement, whether plaintiff has fulfilled the requirements of the Affirmative Action Program executed under the provisions of the Conciliation Agreement. The report submitted is inadequate and meaningless in making any relevant determinations as to plaintiff's compliance with the Conciliation Agreement.

"8. The development of the above facts, as well as the information regarding any alternative which plaintiff may have available to allow it to absorb employees protected by Title VII,

which the court rendered an oral opinion.[8] The district court denied the motion to dismiss brought by GSA and OFCC[9] and granted partial summary judgment, requiring the Company to lay off employees in a manner inconsistent with the collective bargaining agreement to avoid a reduction in the percentage of females and minority group members in the work force. As such, the district court rejected the Unions' contentions that the collective bargaining provisions (layoff by reverse order of seniority) were to control without modification.

In particular, the district court's order required that: (1) the seniority provisions of the collective bargaining agreement could not be construed in such a manner as to frustrate the purpose of the conciliation agreement (to wit: that at the end of five years females and minority group members would constitute a proportion of the Company's work force which would

within the framework of its present economic conditions, are essential material facts not presently before this Court in the pleadings, affidavits, and other papers on file in this matter."

* * * * *

"While we recognize that disputes may indeed exist as to these particular facts, when and if developed, we cannot say that these facts were material to the issues before the district court on the motion for summary judgment. The issues before the district court were those of contract interpretation and we fail to discern how these facts, or the lack of them as asserted by EEOC, have a bearing upon those issues. As discussed in Part IV *infra*, these facts cannot be deemed material so as to preclude summary judgment."

[8] The oral opinion is currently reported at 8 FEP Cases 690.

[9] As noted, in its opinion the district court specifically refused to consider issues involving Executive Order 11,246 and Title VII violations. *See* n. 4, *supra*. *Compare Western Additions Community Organ.* v. *N.L.R.B.*, 158 U.S. App. D.C. 138, 485 F. 2d 917 (1973), cert. granted, 415 U.S. 913, 94 S. Ct. 1407, 39 L. Ed. 2d 446 (1974).

approximate the proportion of those groups in the relevant labor market);[10] (2) the provisions of the conciliation agreement were to prevail over the provisions of the collective bargaining agreement to the extent that the two agreements were in conflict; and (3) layoffs were to be accomplished in such a manner so that upon completion, the minority group and female worker ratios would be the same as those existing as of July 27, 1974 (approximately one month prior to the commencement of layoffs).

The district court granted leave to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Pursuant thereto the defendant Unions applied for leave to appeal and a panel of this Court granted such leave [10a] on October 9, 1974, at the same time staying the district court's order and expediting appeal.[11] Prior to the hearing on November 15, 1974, defendant-

[10] We note that the conciliation agreement does not define the term "relevant labor market." The EEOC used New Jersey statewide percentages of females and minority group members in finding reasonable cause to believe the Company discriminated against these groups. Although the Unions contest a statewide application for the term "relevant labor market", we need not, and do not, decide the propriety of such an inclusive definition in view of our disposition of the issues currently before us.

[10a] New Jersey State AFL-CIO filed a brief in this matter by consent of the parties.

[11] The district court provided that it would stay its order pending application to this Court for a stay pending appeal only on the condition that the party seeking the stay indemnify and exonerate the Company "of and from any and all claims for reinstatment and back-pay made by any employee laid off during the effectiveness of the stay who is found to have been improperly laid off at the final determination of the appeal." The district court did not enter such a stay absent compliance by the Unions with the conditions announced by the district

appellee EEOC moved to vacate the October 9, 1974 stay. That motion was denied.[12]

I.B. Facts [13]

The Company is a large public utility operating in New Jersey and engaged in the generation and distribution of electrical power throughout approximately half of that State. As of June 29, 1974, the Company employed 3,859 employees, of whom 2,877 were in the bargaining units represented by the Unions involved in the instant proceeding.

On January 28, 1972, a charge had been filed with the EEOC alleging that the Company and the Unions unlawfully discriminated against women and "minority group persons," [14] in violation of Title VII of the Civil Rights Act of 1964. The EEOC investigated the charge and found [15] reasonable cause to believe that the Company discriminated against minority group persons and females with respect to hiring and job

court. Consequently, from September 5, 1974 to October 9, 1974, the Company laid off employees pursuant to the district court directives.

[12] The order denying EEOC's motion to vacate was filed on November 19, 1974.

[13] The facts, indicated in the text, appear in the complaint and in the various affidavits filed and are undisputed.

[14] In the charge originally filed with the EEOC the term "minority group persons" included Blacks, Jews and Spanish-surnamed Americans. However, in the arguments before this Court and in the data regarding the racial and ethnic breakdown of the Company's employees, the term "minority group persons" has been used (and as we use that term in this Opinion) primarily to describe Blacks and Spanish-surnamed Americans.

[15] In re *Jersey Central Power & Light Co. and Int'l Bhd. of Elec. Workers*, Case No. YNK2-063 (Jan. 19, 1973).

assignments.[16] Thereafter, a conciliation agreement was entered into among the Company, EEOC, and the Unions. The conciliation agreement was signed in January, 1974, to be effective from December 3, 1973 through December 3, 1977. The agreement was divided into several sections. Section I—"General Provisions"—provides, *inter alia:*

> 1. It is understood that this Agreement does not constitute an admission by the Respondents of any violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> * * * * *
>
> 3. The Commission agrees not to sue the Respondents over matters contained in this Agreement subject to Respondent's compliance with the promises and representations contained herein. If the Commission believes that this Agreement has been violated, it shall first attempt to resolve the dispute with the parties; then if no Agreement can be reached, the Commission can seek to enforce this Agreement through the legal process.
>
> 4. This waiver by the Commission extends to any matter which is covered by this Agreement. This does not preclude individual Charging Parties, or the Commission itself, from filing charges or suit over new matters or practices which may arise with respect to practices of the Respondents.
>
> 5. Respondents agree that all hiring and promotion practices, and any and all other conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, creed, ancestry, religion, sex, national origin, age, place of birth, marital status or liability for services in the armed forces of the United States in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> * * * * *

[16] In issuing its decision as to "reasonable cause", the EEOC withheld decision as to the Company's recruitment and training practices as they affected females and minority group persons and as to the Company's promotion practices as they affected minority group persons only.

With respect to the defendant Unions, EEOC found reasonable cause to believe that they discriminated against women by virtue of the maternity benefit provisions in the collective bargaining agreement. The EEOC withheld decision with respect to allegations of discrimination by the Union in representation, referral and membership practices.

Other than as may be reflected in the conciliation agreement, the record does not reveal the disposition by the EEOC of those issues which were so reserved.

Section III of the conciliation agreement ("Recruitment and Hiring Practices") Paragraph 9, obligates the Company to make reasonable efforts to "recruit minorities and females into those craft areas where such jobs are to be filled by new hires, where they have heretofore been under utilized or not employed." Paragraph 10 provides that the minority group persons and female recruits for craft jobs are to be given credit for experience gained in the craft with other employers and may be considered for jobs other than those at the entry level. Paragraph 10 concludes that:

> **The wages, benefits, other conditions of employment and seniority date of such employee shall be determined in accordance with the provisions of the Collective Bargaining Agreement.**

Section IV of the conciliation agreement is entitled "Promotion and Transfer" and establishes a special program for female and minority group Company employees who are to be given preference for promotions and transfers into vacant positions on the basis of their company seniority.[17] Paragaph 2 specifically

[17] *See* n. 22, *infra.*

provides: "For purposes of this Conciliation Agreement vacancies occasioned by layoff * * * shall not be considered as vacancies."

Section V ("Affirmative Action") establishes a five year affirmative action program designed to increase the percentage of minority group and female employees.[18] Among other provisions, the agreement also provides for reporting (Section IX), a modification of the maternity leave policy (Section VI) and certain payments by the Company to employees and others for past discriminatory practices. (Section VII).[19]

[18] The percentages to be attained by December 1977, the end of the five year affirmative action plan, and the hiring rate necessary to achieve those percentage goals, are set forth in the conciliation agreement:

	Min. %	Hiring Rate %	Fem. %	Hiring Rate %
Officials & Managers	3.0	5.0	5.0	8.0
Professionals	5.0	8.0	5.0	8.0
Technicians	6.0	9.0	3.0	5.0
Sales	3.0	5.0	13.0	20.0
Office Clerical	9.0	14.0	46.0	70.0
Skilled	8.0	12.0	1.0	2.0
Semi-Skilled	19.0	28.0	3.0	5.0
Laborer-Unskilled	24.0	36.0	3.0	5.0
Service Workers	21.0	32.0	31.0	46.0

(Section V. Par. 1).

The primary obligation for achieving these percentages among employees is on the Company, as it, and not the Unions, is solely responsible for hiring. Affidavit of Edward Semoneit, ¶ 2 at 2 (filed Sept. 5, 1974).

[19] The conciliation agreement also sets forth a general Union obligation under which the Unions acknowledge their express obligations under the agreement and further agree "that they shall not resist other provisions as set forth in this Agreement." (Section VIII).

The conciliation agreement has no express seniority provision nor does it expressly modify or alter the seniority provisions found in the collective bargaining agreement.[20] Rather, a fair reading of the conciliation agreement reveals that it is primarily concerned with the hiring, promotion and transfer of female and minority group employees.

On December 3, 1973, prior to the execution of the conciliation agreement by the Company, the Unions and EEOC, the Company and the Unions entered into a new collective bargaining agreement effective from November 1, 1973 through October 31, 1975. In pertinent part the collective bargaining agreement continues the seniority policies in operation among the bargaining unit employees of the Company.[21] In regard to layoffs, the collective bargaining agreement provides *inter alia:*

[20] The uncontradicted affidavit of Edward Semoneit, President of the Unions' System Council which bargains on behalf of the Unions, reveals that during negotiations for the conciliation agreement, the EEOC attempted to negotiate a seniority system which would give minority group and female employees greater seniority than they would actually have had under the prevailing method of calculating employee seniority. The EEOC's suggestion, however, was apparently rejected as it does not appear in the conciliation agreement. As stated in Mr. Semoneit's affidavit:

"The EEOC proposed for the conciliation agreement that minority and female employees be given artificial seniority for *job selection and transfer purposes.* We opposed this proposal and the representative of the EEOC withdrew it. It was agreed, as is stated in the executed conciliation agreement, that all employees receive normal seniority pursuant to the terms of the collective bargaining agreement. (emphasis supplied)."

Semoneit Affidavit, *supra* n. 18, ¶ 4 at 2.

[21] See Brief for Appellants at 2–3.

> 3.2. (a) All layoffs, or demotions occasioned because of falling off or curtailment of work, shall be discussed with the Union two (2) weeks in advance of the layoff and shall be made in order of seniority. No senior employee shall be laid off as long as any work which he can reasonably be expected to do is being performed by an employee junior in point of service.
>
> * * * * *
>
> 3.3. Employees who have been laid off shall be reinstated to employment as need for their services arises, in the reverse order of their layoff.
>
> 3.4. Seniority is defined as length of continuous service with the Company * * *.
>
> * * * * *

These provisions establish a plant-wide seniority system [22] for employees with respect to layoffs.[23]

The Company in its pleadings asserts that economic considerations compelled it to announce a layoff of employees in July, 1974. The Company estimates that

[22] Seniority may be measured by a number of different methods. We here use the terms "plant-wide" and "company-wide" seniority to describe seniority measured by the total length of employment with the employer. Other means of establishing seniority which are not employed here by the Company and Unions are: length of service in a department ("departmental seniority"); length of service in a line of progression ("progression line" seniority) or length of service in a job ("job" seniority). *See generally* Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1601 (1969).

[23] Under the Company's plant-wide seniority system, preference is afforded to the senior worker for purposes of promotion, transfer and other forms of job assignment as well as for purposes of layoff. *See* Agreement between Jersey Central Power & Light Co. and Local Unions 327 et al. ¶ 3.1, 3.8 (a)–(e), Dec. 3, 1973.

approximately 400 employees will have been laid off by mid-December, 1974. The Unions required strict adherence by the Company to the seniority provisions of the collective bargaining agreement. The EEOC responded to the Company's layoff plans by indicating that a layoff accomplished by seniority alone would violate the provisions of the conciliation agreement and Title VII of the Civil Rights Act of 1964.[24]

Confronted with two apparently conflicting contracts, the Company instituted this action for declaratory judgment. At about the same time, the Company and the Unions submitted to an expedited arbitration proceeding under their collective bargaining agreement to determine if a layoff of employees in reverse order of seniority would violate the non-discrimination provision of the collective bargaining agreement.[25] On

[24] *See* Company Affidavit of James R. Joyce, ¶ 7 (filed July 18, 1974). GSA and OFCC likewise adopted (albeit unofficially, *see* GSA and OFCC Brief at 9, 12–13) the position that the Company's proposed method of layoff would violate Executive Order 11,246. *Id.* at ¶ 4–6; Affidavit of James R. Leva, ¶ 12 at 4 (filed July 18, 1974).

[25] The question submitted to the arbitrator was:

"Will a layoff of employees in accordance with the seniority provisions of Article 3.2(a) constitute a violation of the non-discrimination provisions of Article 1.1(d) of the collective bargaining agreement when applied to the layoff announced on July 16th? If so, what method should be utilized in selecting employees for layoff?"

Article 1.1(d) of the agreement is apparently broader than coverage under Title VII in that it additionally proscribes discrimination with respect to marital status and military service. It provides:

"The Company and the Union agree that the application of the various provisions of this Agreement shall in no way serve to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment or otherwise affect his status as an employee because of such in-

August 21, 1974, the arbitrator held that a layoff in accordance with the seniority provisions of the collective bargaining agreement would not violate the nondiscrimination provision of the same document.[26]

In accordance with the arbitrator's award, on August 23, 1974, the Company commenced the layoff in reverse order of seniority. Layoffs in this manner continued until September 5, 1974 when the district court issued its opinion which, as previously noted, required accommodation with the conciliation agreement.

After the first week of layoffs, statistics provided by the Company indicated that the layoffs had a disproportionate impact upon minority group employment.[27]

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dividual's race, color, creed, ancestry, religion, national origin, sex, age, place of birth, marital status, or liability for service in the armed forces of the United States."

[26] The opinion of the arbitrator which was to follow his award does not appear in the record. We note, however, that the arbitrator did not rule on or consider the possibility of conflict between layoffs in accordance with seniority and the conciliation agreement.

[27] Because of the system of layoff utilized by the Company it is often difficult to identify in advance the employee who is to be laid off or terminated. "Layoffs" are accomplished in two manners: (1) direct layoffs of most junior employees from the bottom of the Company's companywide seniority list, and (2) the abolishment of jobs held by senior employees. Layoff accomplished by the latter method precludes identification of the individual who will actually lose his or her job at the time that the senior employee's job is abolished. The inability to identify the employee results from a "bumping" system established by the collective bargaining agreement: i.e., senior employees who have been displaced can "bump" employees junior to them on the companywide seniority list and thereby fill the position formerly held by the more junior employee. Article III, ¶ 3.2(a) of the collective bargaining agreement in part provides:

"No senior employee shall be laid off as long as any work which he can reasonably be expected to do is being performed by an employee junior in point of service."

As of August 30, 1974, one hundred seventy-six (176) employees were identified for layoff or termination, of which 30.7% or 54, were male or female minority group persons. As a result of this first group of *bargaining unit* employees being laid off, the percentage of male and female minority group employees in the *bargaining unit* decreased from 7.9% on July 27, 1974 to 6.4% as of August 30, 1974.[28] With respect to female employees only, however, the initial layoff had no disparate impact. Both before and after the layoff, women constituted 14.6% of the total workforce and 15.2% of the bargaining unit.[29]

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[28] The first week of layoff had a similar disproportionate effect on minority group employment among *total* Company employees. The precentage of male and female minority group employees decreased from 6.7% on July 27, 1974 to 5.6% as of August 30, 1974.

The figures and percentages noted above and in the text are found in Affidavit of James R. Leva, Attachment D., *supra* n. 24.

[29] *Id.* The precentage of women listed in James R. Leva's Affidavit represents both white and minority group female employees. Consequently, female minority group persons were included in percentages for both minority group employees and female employees. We do not, however, believe this "double-counting" of minority group female employees to be of significance in our analysis of the issues here presented.

At oral argument before us, counsel for the Company stated that by November 22, 1974 a total of 292 employees were to be laid off, of whom 83, or 28.4%, were minority group members. The individuals who were to be laid off or terminated by that date, had been notified, and thereby were identified. The effect of this layoff on the proportion of minority group employees would be to decrease the percentage of male and female minority group employees in the bargaining unit from 6.4% on August 30, 1974 to approximately 4.9% as of November 22, 1974. No representations were made to the Court that this layoff would similarly create a disproportionate impact upon the percentage of female employees.

Subsequent to the district court's opinion announced on September 5, 1974, the Company began to program the remainder of its layoffs to comply with the district court's directive that the female and minority group employee ratios existing as of July 27, 1974 be maintained throughout the layoff process. The Company continued layoffs pursuant to the district court's directive until October 9, 1974, at which time this Court granted a motion to stay the order of the district court. Since October 9, 1974 the Company has reverted to laying off employees solely by reverse order of seniority.

II. Jurisdiction

We need not make any detailed inquiry into the threshold question of jurisdiction.[30] We are satisfied that the pleadings and the record establish the requisite jurisdiction. The complaint, among other jurisdictional allegations,[31] predicates jurisdiction on § 301(a) of the Labor Management Relations Act of

[30] The question of lack of subject matter jurisdiction was raised in the district court by a motion to dismiss filed by defendants GSA and OFCC. This motion was denied by the district court and defendants GSA and OFCC have not filed a separate notice of appeal. The failure of any party to raise a jurisdictional issue on appeal does not foreclose us from an inquiry into jurisdiction *sua sponte*. *See Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884); *Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Comm'n*, 465 F. 2d 237, 241 (3d Cir. 1972), cert. denied, 410 U.S. 943, 93 S. Ct. 1367, 35 L. Ed. 2d 609 (1973). Accordingly, this Court requested all parties, including GSA and OFCC, to address the issue of jurisdiction during oral argument before us.

[31] The Company asserted as statutory grounds for jurisdiction: the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; 28 U.S.C. § 1346; and section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. Although not referring to any statute, the Company further contended that jurisdiction was conferred "by the laws of the United States of American regulating commerce. * * *"

We recognize that most of the grounds asserted do not properly invoke jurisdiction in this context. The Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, does not of and by itself confer jurisdiction upon the federal courts, but requires an independent jurisdictional basis. *See, e.g., Schilling* v. *Rogers*, 363 U.S. 666, 677, 80 S. Ct. 1288, 4 L. Ed. 2d 1478 (1960); *Getty Oil Co. (Eastern Operations), Inc.* v. *Ruckelshaus*, 467 F. 2d 349 (3d Cir. 1972), cert. denied, 409 U.S. 1125, 93 S. Ct. 937, 35 L. Ed. 2d 256 (1973). As the employer cannot be the victim of discriminatory employment practices, the Company cannot invoke jurisdiction under Title VII. *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 54, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974); *Oubichon* v. *North American Rockwell Corp.*, 482 F. 2d 569, 573 (9th Cir. 1973). Finally, 28 U.S.C. § 1346 is incapable of conferring jurisdiction here as only equitable relief is sought. Section 1346 establishes jurisdiction for actions to recover internal revenue taxes; for actions against the Government in negligence; for civil actions under the Internal Revenue Code § 7426; for actions to quiet title in real property in which the United States claims an interest and for

> Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, * * * or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort * * *.

28 U.S.C. § 1346(a)(2). This last cited provision is limited to conferring jurisdiction for actions seeking recovery of a money judgment, which is not claimed here. *Richardson* v. *Morris*, 409 U.S. 464, 93 S. Ct. 629, 34 L. Ed. 2d 647 (1973).

[32] Although in the proceedings below the district court viewed the collective bargaining agreement as a contract to be con-

735, 390 U.S. 557, 561–562, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968); *see also Serio* v. *Liss,* 300 F. 2d 386 (3d Cir. 1961).

We also believe that jurisdiction has been properly invoked with respect to those issues involving the conciliation agreement and the EEOC. In our opinion, inasmuch as the EEOC agreement must be interpreted according to federal substantive law, *see United States* v. *Seckinger,* 397 U.S. 203, 209–210, 90 S. Ct. 880, 25 L. Ed. 2d 224 (1970), the Company's cause of action joining EEOC "arises under" laws of the United States within the meaning of 28 U.S.C. § 1331.[33] *See Illinois* v. *City of Milwaukee,* 406 U.S. 91, 100, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972); *Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.,* 391 F. 2d 486, 492 (2d Cir. 1968). We are also satisfied that

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strued pursuant to New Jersey state law, it did so erroneously. Federal law is to be applied as the substantive law in actions arising under § 301, including those actions which seek declaratory judgment. "Federal interpretation of the federal law will govern, not state law." *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457, 77 S. Ct. 912, 918, 1 L. Ed. 2d 972 (1957). Indeed an action arising under § 301 is controlled by federal substantive law, even though the proceeding is in a state court. *Humphrey* v. *Moore,* 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370 (1964).

[33] Section 1331 in pertinent part provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

We are of the view that the Company's verified complaint and accompanying affidavits are sufficient to establish an amount in controversy in excess of $10,000.00. We reach this conclusion even though the Company failed to specifically allege an amount in controversy, setting forth instead figures and information by which its possible liability for back pay claims and other expenses may be calculated.

even if there were no independent ground of jurisdiction existing under § 1331,[34] that nonetheless there exists jurisdiction ancillary to the proper resolution of the Company's cause of action based upon the collective bargaining agreement. *See Rosado* v. *Wyman,* 397 U.S. 397, 405, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970); *Almenares* v. *Wyman,* 453 F. 2d 1075, 1083 (2d Cir. 1971), cert. denied, 405 U.S. 944, 92 S. Ct. 962, 30 L. Ed. 2d 815 (1972).

As we have previously indicated, *see* n. 5 *supra,* the Company's action for declaratory judgment presents a justiciable case or controversy, as indeed it must, under Article III of the Constitution. *E.g., Lake Carriers Ass'n* v. *MacMullan,* 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 (1972); *Golden* v. *Zwickler,* 394 U.S. 103, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969). A case or controversy in the constitutional sense "must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227, 240–241, 57 S. Ct. 461, 464, 81 L. Ed. 617 (1937);

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[34] As we hold jurisdiction is present under the grounds noted in the text, we believe it unnecessary to decide whether the district court would also have jurisdiction under § 1337 under the proposition that the conciliation agreement was entered into by the EEOC on authority granted by the Civil Rights Act of 1964, assertedly an Act of Congress regulating commerce. Cf. *Gardner* v. *Nashville Housing Auth.,* 468 F. 2d 480 (6th Cir. 1972). Section 1337 in pertinent part provides:

The tests of "arising under" required by Section 1337 are the civil actions or proceeding arising under any Act of Congress regulating commerce * * *."

The tests of "arising under" required by Section 1337 are the same as those demanded by Section 1331, except that no jurisdictional amount need be alleged. *Felter* v. *Southern Pacific Co.,* 359 U.S. 326, 329 n. 4, 79 S. Ct. 847, 3 L. Ed. 2d 854 (1959); *Peyton* v. *Railway Express Agency, Inc.,* 316 U.S. 350, 62 S. Ct. 1171, 86 L. Ed. 1525 (1942).

see also Maryland Casualty Co. v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941). A dispute is not too hypothetical for the proper exercise of federal jurisdiction if there is present an immediate adverse effect on the parties in a concrete situation. *See Longshoremen's Union* v. *Boyd*, 347 U.S. 222, 223–224, 74 S. Ct. 447, 98 L. Ed. 650 (1954). Moreover, in determining whether a dispute has matured to the point at which the judicial function may be properly exercised, a court may look to the announced intentions of the defendants to take adverse action against the plaintiff. *Younger* v. *Harris*, 401 U.S. 37, 42, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).[35] In this regard, the defendants here have announced their intention to require Company compliance with each particular contract, although the Company implicitly challenges (albeit inconsistently) each party's respective interpretations.[36] Thus in our view, there exists a justiciable case or controversy. *See Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974); *cf. National Automatic Laundry & Cleaning Council* v. *Shultz*, 143 U.S. App. D.C. 274, 443 F. 2d 689 (1971).

[35] The Supreme Court has indicated that a case or controversy for judicial resolution is presented where a plaintiff is "either presently or prospectively subject to the regulations, proscriptions, or compulsions that he * * * [is] challenging." *Laird* v. *Tatum*, 403 U.S. 1, 11, 92 S. Ct. 2318, 2325, 33 L. Ed. 2d 154 (1972). We believe that this language of the Supreme Court has particular application here, even though EEOC has neither sought judicial enforcement of the conciliation agreement nor instituted administrative proceedings under Title VII. *Cf. Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 151–154, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967).

[36] *See* n. 5 *supra*.

III. *Contract Theory*

The district court, viewing the instant proceeding as one requiring the interpretation of contracts only, specifically refused to consider the issue of past employment practices of either the Company or the Unions. Although we agree with the district court that the instant controversy must be analyzed according to the principles of general contract law, *see United States* v. *Seckinger*, 397 U.S. at 210, 90 S. Ct. 880; *Priebe & Sons, Inc.* v. *United States*, 332 U.S. 407, 411, 68 S. Ct. 123, 92 L. Ed. 32 (1947), we must nevertheless differ with that court's interpretations of the two contracts and, as such, with its issuance of the judgment predicated upon those interpretations.[37]

In interpreting the two contracts before us, we must: first, determine whether or not an express or implied conflict exists as between the provisions of the conciliation agreement and the provisions of the collective bargaining agreement, and, if such a conflict does exist, which of the two contracts is to govern; second, if no such conflict is held to exist, determine if the collective bargaining agreement must nevertheless be modi-

[37] When dealing with contract actions, this Court is to review as a matter of law the interpretation given by the district court to the pertinent provisions of the written contract. *See Emor, Inc.* v. *Cyprus Mines Corp.*, 467 F. 2d 770, 773 (3d Cir. 1972); *S. S. Silberblatt, Inc.* v. *Seaboard Surety Co.*, 417 F. 2d 1043, 1055 (8th Cir. 1969).

This standard of review would not be altered even if the contract were executed by a Government party. *Vitex Mfg. Co.* v. *Government of Virgin Islands*, 351 F. 2d 313 (3d Cir. 1965); *see United States* v. *Hanna Nickel Smelting Co.*, 400 F. 2d 944 (9th Cir. 1968); *F. L. Smidth & Co.* v. *United States*, 409 F. 2d 1369 (C.C.P.A. 1969).

fied to accommodate an overriding public policy. The district court followed a similar approach concluding (1) that to the extent that the conciliation agreement conflicts with the collective bargaining agreement, the conciliation agreement prevails; and (2) that the layoffs are not to be accomplished in the manner prescribed by seniority clauses of the collective bargaining agreement, because such a method of layoffs would "frustrate" the objective of the conciliation agreement. We hold both conclusions of the district court to be erroneous as a matter of law.

A. THE TWO CONTRACTS DO NOT CONFLICT

In our interpretation of both contracts we are governed solely by federal law.[38] After comparing and contrasting the provisions of the two contracts, we are of the view that no conflict exists with respect to layoffs.

The conciliation agreement has, as its objective, the percentage increase of females and minority group persons among employees. This objective was to be attained by the Company *hiring* a greater percentage of minority group and female workers—not by resort to a system of "artificial" seniority. *See* note 20, *supra*. As such the conciliation agreement sought an

[38] We are not confronted here, as the district court erroneously believed itself to be, with a "private" collective bargaining agreement to be construed according to state law, and a government contract to be interpreted by reference to federal law. Federal substantive law controls in the interpretation of both the collective bargaining agreement, *see Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957), and the conciliation agreement, *see United States* v. *Seckinger*, 397 U.S. at 209–210, 90 S. Ct. 880 and *United States* v. *County of Allegheny*, 322 U.S. 174, 183, 64 S. Ct. 908, 88 L. Ed. 1209 (1944).

increase in the proportion of female and minority group workers by "hires" and not by "fires." It is highly significant to us that the conciliation agreement contains no overall layoff procedure or seniority system. Moreover, the express terms of the conciliation agreement do not attempt to affect, nor can we interpret them to affect, the layoff provisions of the collective bargaining agreement.[39]

The "new hire" method of attaining a higher proportion of female and minority group workers is evident throughout the conciliation agreement. In particular, reference to "new hires" is made in Section III, paragraph 9 of the conciliation agreement, which provides:

> *Respondent Company shall make a reasonable effort to recruit minorities and females into those craft areas where such jobs are to be filled by new hires,* where they have heretofore been underutilized or not employed. To this end, Respondent Company agrees that in *each instance where a job is not to be filled from within, pursuant to the Collective Bargaining Agreement and practices thereunder, reasonable efforts will be made to secure a minority or female as outlined in paragraph 1 of the Affirmative Action portion* of this Agreement. (emphasis supplied).[40]

[39] In this regard, we note that the district court concluded that the "specific contingency [layoffs by seniority] was not dealt with in the formulation of the [conciliation agreement] program."

Oral Opinion Tr. at 7; 8 FEP Cases at 692.

[40] The contractual exception to filling jobs by female and minority group "new hires" (i.e., "where a job is not to be filled from within") represents a classic example of the seniority "bumping" system. The terms of the paragraph quoted above from the conciliation agreement expressly leave intact the "bumping" system established by the collective bargaining agreement.

Paragraph 1 of the Affirmative Action program, in turn, is confined solely to "new hire" situations:

> Respondent Company is presently undergoing its utilization analysis for preparation of its goals and time tables. *The Company agrees to make every reasonable effort to bring its minority and female workforce up to parity by location and EEO–1 categories as openings for new hires occur* and qualified applicants are available within five (5) years. (emphasis supplied).[41]

We regard the conciliation agreement as unambiguous in its requirements that an increased proportion of females and minority group persons *be hired,* but that *once hired,* workers in these classes be controlled by the terms and conditions of employment as set forth in the collective bargaining agreement. Accordingly, we read the conciliation agreement as not modifying the promotion, transfer or layoff practices established by the collective bargaining agreement once females and minority group persons have been em-

[41] Other references to "new hires" are similarly made in section III, "Recruitment and Hiring Practices." Paragraph 10 provides for credit to be given for pre-employment experience "in filling the existing *new openings with new hires.* * * *" [emphasis supplied]; paragraph 12 pertains to obtaining referrals of female and minority group persons from job referral organizations, provided that "the Company shall estimate the number of vacancies expected to be *filled by new hires.* * * *" [emphasis supplied]; and paragraph 13D requires that "[a]s *job vacancies occur which are to be filled with new hires,* the employer will first consult the Affirmative Action file. * * *" [emphasis supplied].

The reporting obligations of the conciliation agreement is similarly directed to only new hires. Section IX, "Reporting," in part requires:

"3. A listing of all positions filled by *new hires* identifying the name, date of hire, rate of pay, race, sex and job title." [Emphasis supplied].

ployed. We base this interpretation, in part, on two provisions of the conciliation agreement. As previously noted, in regard to recruitment and hiring practices, section III, paragraph 10, provides:

> The wages, benefits, *other conditions of employment and seniority date of such employee* shall be determined in accordance with the provisions of the Collective Bargaining Agreement. (Emphasis supplied).

Moreover, in the context of promotions and transfer practices, section IV, paragraph 2, in pertinent part provides:

> [T]hose male minorities/females who are qualified and who had indicated the desire to transfer shall be given the opportunity to transfer, *using their total length of Company service,* subject to vacancies being available and in a *manner consistent with the current Collective Bargaining Agreement. For purposes of this Conciliation Agreement vacancies occasioned by layoff * * * shall not be considered as vacancies.* (Emphasis supplied).[42]

We thus interpret the conciliation agreement as being consistent with, rather than in conflict with, the

[42] The exception created by this paragraph to jobs for female and minority group employees (i.e. "vacancies occasioned by layoff * * * shall not be considered as vacancies") is consistent with the exception created by the conciliation agreement in section III, paragraph 9. *See* n. 40, *supra.* Section III, paragraph 9 does not require the Company to use "reasonable efforts" to assign a female or minority group worker to jobs which are "to be filled from within." In this context, the phrase "jobs to be filled from within" has obvious reference to an employment vacancy occasioned by layoff. In such circumstances, the "bumping" system nevertheless allows a worker senior to the worker laid off to occupy the position vacated by the layoff. As such, the position opened by the layoff cannot be and is not, properly termed a "vacancy" for purposes of job assignments for female and minority group workers.

collective bargaining agreement, in that it incorporates the Company seniority system.

EEOC alternatively argues that if not an express, at least an implicit inconsistency exists between the two agreements and that this inconsistency requires a modification of the seniority provisions of the collective bargaining agreement. For EEOC's argument to succeed, it must persuade us that despite the silence of the conciliation agreement respecting overall seniority, we should nonetheless interpret the two contracts as being inconsistent.

First, EEOC contends that where the subject matter is the same in two contracts but the contracts contain terms inconsistent with each other, the later agreement will supersede the earlier agreement.[43] Second, EEOC contends that the Company's agreement to use "best efforts" to have its work force reflect the racial, ethnic and sex composition in the relevant labor market should be given effect as an implicit modification of the seniority provisions. Third, EEOC argues that the objectives of the conciliation agreement (to increase the proportion of female and minority group workers) will be thwarted if effect is given to the seniority provisions of the collective bargaining agreement.

We cannot agree with EEOC's arguments. First, whether or not a subsequent contract is deemed to supersede an earlier contract is a question of the parties' intent to be ascertained from the contracts themselves when they are unambiguous. In order for us to hold that the parties intended the second agreement (here the conciliation agreement) to operate as a substituted contract, the terms of the second con-

[43] It is acknowledged that the collective bargaining agreement was signed approximately four months earlier than the conciliation agreement.

tract must be so inconsistent with those of the first that both contracts cannot stand together.[44] Here, we can discern no such intent as the conciliation agreement is completely silent on the issue of overall seniority. Hence, despite its later execution we find no inconsistency, apparent or otherwise, between the two contracts. Accordingly, there is no basis to preclude our sustaining both contracts in full.[45] *See Rosenberg* v. *D. Kaltman & Co. Inc.*, 28 N.J. Super. 459, 101 A. 2d 94 (1953); *compare N.L.R.B.* v. *Operating Engineers Local 12*, 323 F. 2d 545, 548 (9th Cir. 1963); *Port of Seattle* v. *United States*, 450 F. 2d 1363, 1378 (Ct. Cl. 1971).

Second, the conciliation agreement, section III (Recruitment and Hiring Practices) and V (Affirmative Action Program), requires the Company to use "best efforts" to increase the percentage of female and minority group employees. We do not believe that this undertaking by the Company necessarily modifies by implication a seniority system of layoffs. We interpret the "best efforts" commitment in a context that requires the Company to use its "best efforts" to increase the female and minority group proportion among employees as openings for *new hires* arise. This

[44] "If the new agreement contains terms that are *clearly inconsistent* with the previously existing contract * * *, the fact of inconsistency is itself a sufficient indication of intention to abrogate the old and substitute the new. * * * It [the new agreement] *operates as a discharge by substitution only so far as the inconsistency extends.*" 6A. Corbin, Contracts, § 1296 (1962) [emphasis supplied].

[45] In this context, we reiterate our view that the contracts before us are to be interpreted according to principles of general contract law inasmuch as Congress has not adopted a different standard by which the conciliation agreement is to be interpreted. *See, e.g., Priebe & Sons* v. *United States*, 332 U.S. 407, 411, 68 S. Ct. 123, 92 L. Ed. 32 (1947).

is completely consistent with the express terms of the conciliation agreement (*see infra*). Third, with respect to the objective which EEOC claims is defeated if effect is given to the collective bargaining agreement, we believe EEOC has only partially stated the objective of that agreement. As our analysis reveals, the true objective of the conciliation agreement is to increase the percentage of female and minority group employees through "new hires" only. The express language of the conciliation agreement so provides:

> The Company agrees to make every reasonable effort to bring its minority and female work force up to parity * * * as openings for new hires occur and qualified applicants are available within five (5) years.

Section V, paragraph 1. We thus do not agree with EEOC or with the district court that layoffs by reverse order of seniority would unlawfully frustrate this objective.[46]

Hence, we conclude that the two agreements are not in conflict either by their express terms or by im-

[46] In a static economic situation where an employer under this type of conciliation agreement is neither obliged to lay off white male workers and replace them nor to add workers, the consequence of EEOC's interpretation is that the employer would nevertheless be compelled to hire female and minority group workers or be found to act in continuous violation of the conciliation agreement. If we were to adopt EEOC's argument, it would mean that the occurrence of any event which prevented an increase in the proportion of female and minority group workers would be considered as frustrating the objective of the conciliation agreement and thereby constitute a violation of such agreement.

We decline to interpret the conciliation agreement in the manner urged upon us. We fail to discern how the objective of the agreement can lend support to the proposition that whenever the Company, because of economic need, lays off employees and does not accept new hires, it frustrates the objective of the conciliation agreement.

plication. We are obliged, nonetheless, to proceed to the question of whether an overriding public policy dictates a modification of the collective bargaining agreement.

B. PUBLIC POLICY

The district court emphasized that the principal purpose of the conciliation agreement between the Company, the Unions and EEOC was to ensure that at the end of five years the proportion of females and minority group employees would approximate the proportion of those groups in the relevant labor market. The primary basis for the district court's modification of the collective bargaining agreement was the district court's conclusion that insistence on layoff solely according to the collective bargaining agreement would frustrate[47] the purposes of the conciliation agreement.

[47] In support of this analysis the district court cited *Edwards v. Leopoldi*, 20 N. J. Super. 43, 89 A. 2d 264 (App. Div.), cert. denied, 10 N. J. 347, 91 A. 2d 671 (1952). A more recent New Jersey case applying these principles is *Porcelli v. Titus*, 108 N. J. Super. 301, 261 A. 2d 364 (App. Div. 1969), cert. denied, 55 N. J. 310, 261 A. 2d 355 (1970). In that case the state court approved a Board of Education's unilateral suspension of the collective bargaining agreement's promotion procedure, when local civil disorders provoked an educational crisis requiring greater promotional opportunities for Blacks than existed at the time under the Union contract. The court in part stated:

"[T]he concept of impossibility should prevail where a particular provision in a school contract is rendered impractical by subsequent events demanding changes in an educational program in order to give meaningful effect to an overriding public policy." 108 N. J. Super. at 313, 261 A. 2d at 370.

We note, moreover, that the state court in *Porcelli* in holding performance to be "impossible" under the Union contract believed that to compel performance according to the provisions of the Union contract would be contrary to the public policy and welfare.

As our analysis indicates, the district court's conclusion in this respect is without merit. Consequently, we now believe the appropriate inquiry is whether a seniority clause providing for layoffs by reverse order of seniority *must* be modified as being contrary to public policy and welfare. *Cf.* Restatement, Contracts, § 369, at 671 (1932).

In order to declare the provisions of the collective bargaining agreement (entered into by the parties freely and without evidence of fraud) void as against public policy, the contract terms must be invalid on the basis of clear and distinct legal principles. The Supreme Court has stated:

> * * * As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy * * *. Only dominant public policy would justify [invalidating contracts] * * *.

Muschany v. *United States*, 324 U.S. 49, 66, 65 S. Ct. 442, 451, 89 L. Ed. 744 (1945). Pursuant to this principle, public policy of the United States in general, is to be determined from a consideration of the Constitution, treaties, federal statutes and applicable legal precedents. *See Hurd* v. *Hodge*, 334 U.S. 24, 34–36, 68 S. Ct. 847, 92 L. Ed. 1187 (1948); *Muschany*, 324 U.S. at 66, 65 S. Ct. 442; *St. Louis Mining & Milling Co.* v. *Montana Mining Co.*, 171 U.S. 650, 655, 19 S. Ct. 61, 45 L. Ed. 320 (1898). In the case *sub judice* we are not without legislative guidance in ascertaining the public policy applicable to the particular situation here presented. Title VII of the Civil Rights Act of 1964 provides Congress' formulation of public policy. *Cf. Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U.S. 353, 357, 51 S. Ct. 476, 75 L. Ed. 1112 (1931). By

Title VII, Congress in the context of employment discrimination supplanted with its own views any judicial determination of public policy.[48] *Cf. United States* v. *Atlantic Mutual Ins. Co.*, 343 U.S. 236, 245, 72 S. Ct. 666, 96 L. Ed. 907 (1952) (Frankfurter, J., dissenting).

Our reading of Title VII reveals no statutory proscription of plant-wide seniority systems. To the contrary, Title VII authorizes the use of "bona fide" seniority systems:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system * * *.

42 U.S.C. § 2000e–2(h). Moreover, we can discern no "* * * definite indications * * * to justify the invalidation of [such] a contract as contrary to that

[48] To date, two opposing interpretations exist of the legislative history of Title VII as it pertains to company-wide seniority systems under collective bargaining agreements. *Compare Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309 (7th Cir. 1974) *with Watkins* v. *Steel Workers Local 2369*, 369 F. Supp. 1221, 1227–1229 (E.D. La. 1974) appeal docketed No. 74–2604 (5th Cir. June 17, 1974). *Watkins* under its construction of congressional intent, holds that company-wide seniority systems may be held to violate Title VII if found to perpetuate the effects of past discrimination. *Waters*, on the other hand, by its interpretation of congressional intent, holds that a company-wide seniority system, neutral on its face, will not violate Title VII. Neither court held that Congress intended that plant-wide seniority systems, without more, violate public policy. Hence, whether we adopt the *Watkins* or *Waters* interpretation of legislative history, we nevertheless conclude that public policy does not proscribe seniority provisions such as those at issue here.

[public] policy." *Muschany,* 324 U.S. at 66, 65 S. Ct. at 451.[49] While the legislative history of Title VII is largely uninstructive with respect to seniority rights, it is evident to us that Congress did not intend that a *per se* violation of the Act occur whenever females and minority group persons are disadvantaged by reverse seniority layoffs.[50] *See United States* v. *Jacksonville Terminal Co.,* 451 F. 2d 418, 445 (5th Cir. 1971), cert. denied, 406 U.S. 906, 92 S. Ct. 1607, 31 L. Ed. 2d 815 (1972).

Accordingly, we hold that a seniority clause providing for layoffs by reverse order of seniority is not contrary to public policy and welfare and consequently is not subject to modification by court decree.

IV. Evidentiary Considerations

To this point we have concluded that: (1) the seniority provisions of the Company's collective bargaining agreement are not inconsistent with any provision of the conciliation agreement; and (2) the seniority provisions do not offend public policy.

[49] In this regard, we recognize that those courts confronted with devising remedies for aggrieved workers who were discriminated against under departmental seniority systems, have granted a form of relief which substitutes a plant-wide seniority system for a departmental system. *E.g., Franks* v. *Bowman Transp. Co.,* 495 F. 2d 398 (5th Cir. 1974); *United States* v. *Bethlehem Steel Corp.,* 446 F. 2d 652 (2d Cir. 1971). Under such relief, departmental seniority is discounted, as employees must compete on the basis of actual number of years employed by the Company. Consequently, a minority group worker hired prior to a white worker, but having less years of seniority in the previously all-white department, becomes senior to the white worker for benefits and promotion. However, a minority group worker hired *after* a white worker remains junior in seniority to the white worker even after institution of a plant-wide seniority system. See e.g., *Bethlehem Steel Corp., supra* at 661.

[50] *Accord* Note, Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach, 84 Yale L.J. 98, 100–01 n. 17 (1974); and discussion in Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1159–60 (1971).

There remains for our consideration the effect that *evidence* of discrimination may have upon laying off workers in reverse order of seniority. We turn to evidentiary considerations at this juncture because: (1) evidence appears in the record indicating disparate impact on the employment of female and minority group workers,[51] *cf. Western Addition Community Organ.,* v. *N.L.R.B.,* 485 F. 2d 917 (D.C. Cir. 1973), cert. granted, 415 U.S. 913, 94 S. Ct. 1487, 39 L. Ed. 2d 446 (1974); and (2) we are obliged to furnish directions to the district court with respect to evidence, if any, it may receive concerning those issues which remain for resolution.

Consequently we must answer the following questions: (1) what evidence, if any, may be adduced in the district court; (2) to what issue is such evidence to be directed? Depending upon the answers to the preceding questions, the ultimate question in this pro-

[51] We recognize that the Company's affidavits contain statistics for the period 1966–1974 revealing a disproportion in the number of minority group and female employees. However, we decline to equate as a matter of law such a statistical showing with a *per se* violation of Title VII. *But see Parham* v. *Southwestern Bell Tel. Co.,* 433 F. 2d 421, 426 (8th Cir. 1971) (holding statistics of gross disparity to constitute a *per se* violation). At the most, we believe the better view is that statistics showing disparity may present a *prima facie* case of Title VII violation, but, without more, mere statistics are not conclusive proof of discriminatory practices. *See United States* v. *Hayes Int'l Corp.,* 456 F. 2d 112, 120 (5th Cir. 1972). Here the record reveals no more than just bare statistics. In any event, by reason of our disposition (*see* n. 54, *infra*) even these statistics are unavailing to a litigant unless and until the plant-wide seniority provisions are declared not to be *bona fide.*

ceeding becomes: assuming, *arguendo,* evidence of past discrimination, is judicial modification permitted of facially neutral plantwide seniority provisions where these provisions operate to the disadvantage of female and minority group workers?

We are not concerned here with allegations or proof that the Company's plant-wide seniority system is by its express terms and intent presently discriminatory. Nor are we concerned with any charges or proofs that this plant-wide seniority system, which is facially neutral, was intended and designed to disguise present discriminatory practices.[52] The only challenge to the validity of the Company's plant-wide seniority system is that the seniority system, although facially neutral, nevertheless violates Title VII in that it operates to carry forward the effect of prior acts of discrimination. If evidence were to be permitted in support of such a theory, *see Watkins, supra* note 48, it could, at best, demonstrate that past discrimination occurred, and that the effects of such past discrimination are perpetuated by the present layoff practices under the current plant-wide seniority system. As we explain below, proofs of this nature are without probative value in challenging a bona fide seniority system. We believe that Congress intended to bar proof of the "perpetuating" effect of a plant-wide seniority system as it regarded such systems as "bona fide".[53] Congress, while recognizing that a bona fide seniority system might well perpetuate past discriminatory practices, nevertheless chose between upsetting all collective bargaining agreements with such provisions

[52] Other than the Company affidavits (*see* note 51, *supra*), the record is completely silent as to proof or assertions that discriminatory employment practices exist or that the seniority provisions are not *bona fide*.

[53] *See* 42 U.S.C. § 2000e–2(h); note 49, *supra*.

and permitting them despite the perpetuating effect that they might have. We believe that Congress intended a plant-wide seniority system, facially neutral but having a disproportionate impact on female and minority group workers, to be a bona fide seniority system within the meaning of § 703(h) of the Act.

To effectuate this intent, the only evidence probative in a challenge to a plant-wide seniority system would be evidence directed to its *bona fide* character; that is, evidence directed either to the neutrality of the seniority system or evidence directed to ascertaining an intent or design to disguise discrimination.[54] As such, it is not fatal that the seniority system continues

[54] Our analysis would make it appropriate for a district court to have evidence presented in two stages. At the first stage, evidence would be received with respect to the *bona fide* nature of the plant-wide seniority system. If, based on such evidence, the court finds the challenged plant-wide seniority system to be *bona fide*, no further evidence or inquiry would be needed. However, if it is established that the plant-wide seniority system is not *bona fide*, then at a second evidentiary stage an aggrieved or proper party seeking relief may adduce all evidence relevant to a Title VII proceeding, including but not limited to past discriminatory employment practices. *See, e.g., Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974); *United States* v. *N. L. Indus., Inc.*, 479 F. 2d 354, 364 (8th Cir. 1973); *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906, 92 S. Ct. 1607, 31 L. Ed. 2d 815 (1972); *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (2d Cir. 1971); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971), petitions for cert. dismissed, 404 U.S. 1006, 92 S. Ct. 573, 30 L. Ed. 2d 655 (1971) and 404 U.S. 1007, 92 S. Ct. 651, 30 L. Ed. 2d 655 (1972); *Papermakers Local 189*, 416 F. 2d at 988; *see, also, Peters* v. *Missouri-Pacific R. Co.*, 483 F. 2d 490 (5th Cir.), cert. denied, 414 U.S. 1002, 94 S. Ct. 356, 38 L. Ed. 2d 238 (1973). In this context, a bona fide plant-wide seniority system is one which is facially neutral and was neither designed nor intended to disguise discriminatory practices.

the effect of past employment discrimination. We believe this result was recognized and left undisturbed by Congress in its enactment of § 703(h) and (j).[55] Although the Congressional statements which we set out were made prior to the adoption of the Act in its final form and therefore were not addressed to the explicit language of § 703(h), these statements nonetheless were directed to the effect of seniority systems with which § 703(h) is concerned. As such, we believe they are of primary assistance in interpreting congressional intent as to seniority systems.[56]

The Interpretive Memorandum of Senators Clark and Case, floor managers for the Title VII bill in the Senate, in pertinent part provided:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when

[55] Section 703(j), 42 U.S.C. § 2000e-2(j), in pertinent part provides:

"(j) Nothing contained in this subchapter shall be interpreted to require any employer, * * * to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, * * *".

[56] Although a recent district court case has rejected the quoted congressional statements as an interpretive guide because of this chronology, we do not agree with its analysis. *Watkins* v. *Steel Workers Local 2369*, 369 F. Supp. 1221, 1227–1229 (E.D. La. 1974), appeal docketed No. 74–2604 (5th Cir. June 17, 1974). We believe that the legislative statements made prior to the introduction of § 703(h) and dealing directly with seniority systems are entitled to weight in interpreting congressional intent as to seniority systems as the enactment of § 703(h) was not designed to change the intent and effect of Title VII. *See* 110 Cong. Rec. 12,723 (1964); Note, *supra* n. 50, at 100–01 n. 17.

> the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them *special seniority rights at the expense of the white workers hired earlier.* (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.) (emphasis supplied.)

110 Cong. Rec. 7213 (April 8, 1964). This interpretation of the interaction of Title VII with the "last hired, first fired" principle of employment seniority was repeated in Sentator Clark's response to written questions posed by Senator Dirksen:

> Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires that they be first fired and the remaining employees are white?
>
> Answer. Senority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.
>
> Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?
>
> Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists.

110 Cong. Rec. 7217 (April 8, 1964). *See also id.* at 6996 (April 6, 1964). Moreover, a memorandum from the Department of Justice presented by Senator Clark similarly interpreted the legislation's effect upon layoffs made pursuant to a system of reverse order of seniority:

> Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is low man on the totem pole he is not being discriminated against because of his race. *Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII.* If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. * * * *But, in the ordinary case, assuming that seniority were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII.* * * * *'Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.* 110 Cong. Rec. 7207 (April 8, 1964). (emphasis supplied.)

Our interpretation of the legislative history of Title VII (i.e., that Congress did not intend the chaotic consequences that would result from declaring unlawful all seniority systems which may disadvantage females and minority group persons, *see, e.g., United States* v. *Jacksonville Terminal Co.,* 451 F. 2d at 445,) has been adopted by other courts as well. The Fifth and Seventh Circuits agree with our view of the legislative history even though they considered this question in the more traditional procedural context of a Title VII proceeding.[57] In *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309 (7th Cir. 1974), the Seventh Circuit stated:

> An employment seniority system embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430–431 [91 S. Ct. 849, 28 L. Ed. 2d 158] (1971).

502 F. 2d at 1320. In *Papermakers Local 189* v. *United States,* 416 F. 2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S. Ct. 926, 25 L. Ed. 2d 100 (1970), the Fifth Circuit reasoned:

> *No doubt, Congress, to prevent "reverse discrimination" meant to protect certain seniority rights that could not have existed but for previous racial discrimination.* For example a Negro who had been rejected by an employer on racial

---

[57] The Seventh Circuit case, *Waters* v. *Wisconsin Steel Works, supra,* was tried under Title VII and 42 U.S.C. § 1981. The complaint charged that the defendant's employment practices and policies constituted individual discrimination against the two plaintiffs. In the Fifth Circuit case, *Papermakers Local 189, supra,* the action was initiated by the Government to set aside job seniority in any form as discriminatory against black employees under Title VII.

grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination. As the court pointed out in *Quarles,* [*Quarles* v. *Phillip Morris,* 279 F. Supp. 505, E.D. Va.] the treatment of "job" or "department seniority" raises problems different from those discussed in the Senate debates: "a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system." 279 F. Supp. at 517.

It is one thing for legislation to require the creation of fictional seniority for newly hired Negroes, and quite another thing for it to require that time actually worked in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. *In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race.* That sentiment was codified in an important portion of Title VII, § 703(j):

"(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the

race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." 42 U.S.C. § 2000e–2(j) * * *.

We conclude, in agreement with Quarles, that Congress exempted from the anti-discrimination requirements only those seniority rights that gave white workers preference over junior Negroes. This is not to say that *Whitfield* [*Whitfield* v. *United States Steelworkers, Local 2708,* 5 Cir., 263 F. 2d 546] and *Quarles* and Title VII prohibit an employer from giving compensatory training and help to the Negro workers who have been discriminated against. Title VII's imposition of an affirmative duty on employers to undo past discrimination permits compensatory action for those who have suffered from prior discrimination. *Papermakers Local 189,* 416 F. 2d at 994–995. (Emphasis supplied.)

We thus conclude in light of the legislative history that on balance a facially neutral companywide seniority system, *without more,* is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices. If a remedy is to be provided alleviating the effects of

past discrimination perpetuated by layoffs in reverse order of seniority, we believe such remedy must be prescribed by the legislature and not by judicial decree.

Having reached this conclusion our analysis is complete. Here, with the meager record before us and considering the manner in which the issues are framed, we need not, and indeed could not, decide whether any different result would obtain in an action brought by an aggrieved party[58] were the requisite burden of proof sustained. *See* note 54, *supra; and generally Alexander* v. *Gardner-Denver Co., supra.* What we decide here can obviously affect and bind only the parties present in this litigation. Of the parties before us, none has offered evidence to prove that the seniority provisions are not *bona fide.*

Having ascertained no basis in the record, or as a matter of law, to sustain the partial summary judgment order of September 23, 1974 as it pertains to the subject of layoffs, we will remand to the district court with directions: (1) to vacate so much of the September 23, 1974 order as is inconsistent with this opinion; and (2) to conduct such further proceedings not inconsistent with this opinion as may thereafter be required.

Each party will bear its own costs.

VAN DUSEN, Circuit Judge, (concurring):

While concurring in the judgment of the court, I respectfully am unable to agree with the majority's

[58] There is no case which we have examined which has been brought in a similar procedural context. All of the cases presenting analogous issues have resulted from either a complaint alleging individual or class discrimination in violation of Title VII, *see, e.g., Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211 (5th Cir. 1974), or a classic "pattern or practice" suit instituted by the Government, *see, e.g., United States* v. *N. L. Indus., Inc.*, 479 F. 2d 354 (8th Cir. 1973).

view of (1) the effect of public policy behind Title VII, and (2) the legislative history of that title. See majority opinion at pages 704–710. Because this case is being remanded and past discrimination may be found on an amplified record in this or a related case, I will state my views briefly.[1]

The importance of the policy underlying Title VII was acknowledged by the Supreme Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), a case involving "the proper relationship between federal courts and the grievance-arbitration machinery of collective bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII * * *." *Id.* at 38, 94 S. Ct. at 1014–1015, as follows:

> [L]egislative enactments in this area have long evinced a general intent to accord parallel

[1] Even though the parties to this case fail to create a record on remand which permits relief under 42 U.S.C. § 2000e–1 ff., other parties, such as employees affected by the current layoffs, are not foreclosed from bringing actions under Title VII or alternative statutes such as 42 U.S.C. § 1981, see *Watkins* v. *U. S. W. A.*, 369 F. Supp. 1221 (E.D. La. 1974); Comment, Implying Punitive Damages in Employment Discrimination Cases, 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 325, 348 (1974). Also, actions can be brought under state law pursuant to Title 10, N.J.S.A. § 5–13 ff., see 42 U.S.C. § 2000e–5(c) and (d), and, possibly, under the N.L.R.A. for breach of the union's duty of fair representation. See *Western Addition Community Org.* v. *N.L.R.B.*, 158 U.S. App. D.C. 138, 485 F. 2d 917, 930 n. 38 (1973), cert. granted, 415 U.S. 913, 94 S. Ct. 1407, 39 L. Ed. 2d 446 (1974). But see Comment, Labor Unions and Title VII: The Impact of Mansion House, 41 Tenn. L. Rev. 718, 721–22 (1974). Under these circumstances, the statements of this court in the majority opinion may become very important in subsequent proceedings in the district court in this or related cases of the type described above.

or overlapping remedies against discrimination. In the Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq., Congress indicated that it considered the policy against discrimination to be of the "highest priority." *Newman* v. *Piggie Park Enterprises, supra,* at 402 [*Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263]. Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. [Citations omitted.] And, in general, submission of a claim to one forum does not preclude a later submission to another. See 42 U.S.C. §§ 2000e–5(b) and (f) (1970 ed. Supp. II); *McDonnell Douglas Corp* v. *Green, supra* [*McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668.] Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

* * * * *

> Title VII * * * concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of those rights would defeat the paramount congressional purpose behind Title VII. 415 U.S. at 47–49, 51–52, 94 S. Ct. at 1019–1020, 1021. See also *id.* at 44–45, 56–60, 94 S. Ct. 1011. [Footnotes omitted.]

The importance of this policy has prompted courts to require that labor agreements of various types be

modified to effect the ends of Title VII. See, e.g., *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309 (7th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F. 2d 211 (5th Cir. 1974); *Vogler* v. *McCarty,* 451 F. 2d 1236 (5th Cir. 1971); *Contractor's Association of Eastern Pa.* v. *Sec'y. of Labor,* 442 F. 2d 159, 174 (3d Cir. 1971); *United States* v. *Sheet Metal Workers, Local 36,* 416 F. 2d 123 (8th Cir. 1969); *Savannah Printing Union* v. *Union Camp Corp.,* 350 F. Supp. 632, 636 (S.D. Ga. 1972). These modifications were ordered even though the seniority provisions were "neutral on their face, and even neutral in terms of intent," where the effect was "to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (1971). See also *Robinson* v. *Lorillard,* 444 F. 2d 791, 796–797 (4th Cir. 1971). The objective criterion of intent and the rationale of these cases apply equally to plant-wide seniority systems where the plant formerly hired on a "whites only" basis.[2] "If the seniority practices struck down * * * were not 'bona fide' within the meaning of section 703(h), because they discriminated on grounds of race, and if former exclusionary practices in those cases established that the present differences in treat-

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[2] For example, I cannot agree with the majority's statement (p. 706 of filed opinion) that "the only evidence probative in a challenge to a plant-wide seniority system would be * * * evidence directed either to the neutrality of the seniority system or evidence directed to ascertaining an intent or design to disguise discrimination." See also last sentence of note 54. After the changed conditions occuring through employment of minority persons in early 1974, the "different terms, conditions or privileges of employment pursuant to a bona fide seniority * * * system" may have become, and hence their continuation would be, "the result of an intention to discriminate." See 42 U.S.C. § 2000e–2(h).

ment of whites and blacks were the result of 'an intention to discriminate' within the meaning of section 703(h), then, for the identical reasons, section 703(h) does not validate seniority practices in formerly white only plants." Cooper & Sobol, Seniority and Testing Under Fair Employment Law: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1629 (1969) [footnotes omitted].[3] It is true that certain cases have indicated that plant-wide seniority systems would be treated differently from job or departmental seniority. *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309, 1318–1320 (7th Cir. 1974); *Local 189, United Papermakers & Paperworkers* v. *United States,* 416 F. 2d 980, 994–995 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S. Ct. 926, 25 L. Ed. 2d 100 (1970). However, the basis for such distinction has been the courts' view of the legislative history of the Act, rather than any conclusion that the principles which required modification of other seniority practices did not apply to plant seniority. I disagree with the interpretation of the legislative history expressed in *Waters* and *Local 189,* as well as by the majority at pp. 707–710.

I find persuasive the writers who contend that the legislative history indicates that Congress, in enacting Title VII, did not intend to preclude remedies altering plant seniority which perpetuates discrimination.[4] See *Watkins* v. *U.S.W.A.,* 369 F. Supp. 1221, 1227–1229 (E.D. La. 1974), app. pending; Cooper & Sobol, *supra*; Comment, The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role For the NLRB, 123 U. Pa. L. Rev. 158, 163–64 (1974). But see Note, Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach, 84 Yale L.J. 98, 100–01 n. 17 (1974).

[3] For the effects of plant-wide seniority on a minority group in a period of lay-offs in a specific situation, see Plantwide Seniority, Black Employment and Employer Affirmative Action, 26 Industrial & Labor Relations Review 686 (1972).

[4] For this reason, I cannot agree with the sweeping language in the last sentence of the second complete paragraph ending on page 706 of the majority opinion.

For these reasons, I disagree with the majority's conclusion at page 710 that no relief could be forthcoming to an aggrieved party who established that a plant-wide seniority system embodied in the collective bargaining agreement perpetuated past discrimination without proving a subjective discriminatory intent.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the cause be, and the same is hereby remanded to the said District Court with directions to vacate so much of the September 23, 1974 order as is inconsistent with the opinion of this Court and to conduct such further proceedings not inconsistent with the opinion of this Court as may thereafter be required. Each party to bear its own costs.

Attest:

_____,
Clerk.

January 30, 1975.

Certified as a true copy and issued in lieu of a formal mandate on March 12, 1975.

Test: THOMAS F. QUINN,
Clerk, United States Court of Appeals
for the Third Circuit.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-182

In the Supreme Court of the United States

OCTOBER TERM, 1975

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

JERSEY CENTRAL POWER & LIGHT CO.; LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL APPENDIX

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A. 1.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ORAL OPINION, SEPTEMBER 5, 1974

Civil No. 74-1083

JERSEY CENTRAL POWER & LIGHT CO., PLAINTIFF,

vs.

LOCAL UNION 327, 749, 1289, 1298, 1303, 1309 and 1314 of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET ALS., DEFENDANTS.

Newark, N. J.
September 5, 1974

Hearing on plaintiff's application
for summary judgment

Before: The Honorable VINCENT P. BIUNNO,
U.S.D.J.

ORAL OPINION

THE COURT: It seems rather clear that the kind of issue which this case involves, namely, the taking of conflicting positions by parties with different interests and different functions to perform, is precisely the kind of situation for which the remedy of declaratory judgment was designed.

In some respects it is different from the traditional declaratory judgment suit in that usually one party

takes a given position and the other takes a different position, and the proceeding brings to the Court those two different positions. Here the traditional pattern is somewhat different because the party moving the case, the employer, does not have a specific position. It seeks to resolve differences between other parties who are defendants, and in this respect it resembles to some extent the relationships found in a proceeding for interpleader or in the nature of interpleader, or perhaps the position of a fiduciary seeking instructions when beneficiaries make conflicting claims.

The major problem at this stage is not so much whether the case is suitable for declaratory relief but whether that relief can be provided at this stage of the case through the motion for summary judgment, and that question, of course, also includes the subordinate question whether, if the Court is of the view that final relief cannot be given in all respects at this time, there is any extent to which partial summary judgment might be appropriate.

Basically the Court sees the problem as one of construing two contracts, the collective bargaining agreement on the one hand and the agreement with EEOC on the other.

The history which is not in dispute shows that there was an agreement entered into with EEOC for the establishment and execution of a program to bring up a proportion of various employee groups to higher levels than they were at the time. In the absence of anything to indicate that that contract is illegal or invalid, the Court sees no need or any point

to explore the question whether there was or was not past discrimination prior to the making of the contract, nor to explore, as Watkins had to, the question of Title Seven per se.

Obviously the statute contemplated that its general provisions would be particularized in specific cases through one means or another, and in this case it had been particularized through the vehicle of an agreement.

It is also quite plain that this case could have been without question filed in the Superior Court of New Jersey. It certainly involves a person interested under a written contract, or whose right, status, or other legal relations are affected by statute, and who is enabled by the state legislation to have determined any question of construction arising under that contract or statute, and to obtain a declaration of rights, status or other legal relations thereunder.

Now, if that had been done the Court is told by at least one of the federal representatives that there would have been a removal to this court. The fact that the plaintiff may have foreseen that move should not in any way minimize the remedies which would have been available to the state court and here had it been first filed in the state court and then removed.

Basically the collective bargaining agreement is one that the state court would normally deal with, and it would be governed by state law. In and of itself it carries no federal aspect. The same is not true of the agreement with the EEOC, which is entered into under federal law and by a federal agency.

Nonetheless since jurisdiction would exist here for the major purpose the questions relating to state law would be dealt with in the one and same proceeding as a matter of pendant jurisdiction.

Now, the employer in New Jersey and federally when engaged in interstate commerce is governed by more that one set of standards in the context of this case. The history of provisions dealing with civil rights or anti-discrimination in New Jersey is very old. The provision against the denial of any civil right merely on account of religious principles goes back to July 2, 1776, when it was made a part of New Jersey's first constitution. That prohibition was continued in the 1844 constitution between that time and the adoption of the 1847 constitution. There were at least ten statutes passed in the period between 1884 and 1945 dealing with this subject.

The 1947 constitution broadened the list of forbidden criteria to include not only religious principles but also race, color, ancestry, or national origin. Legislation since then has increased that list to add sex, age, marital status and liability for service in the armed forces.

Now, there is no question that these state laws were on the books at the time when the present collective bargaining agreement was made and prior thereto. The Court must in looking at the contract take the parties to have made their agreement with the intention to comply with those laws. The rule is well established in New Jersey that if a contract is of doubtful meaning and one interpretation would

render it legal and another illegal, the courts will adopt that construction which will not impute to the parties an intention to violate the law.

The parties to a contract are presumed to have made it in view of the existing law and with knowledge thereof. They will not be presumed to have sat down to make an illegal contract.

Now, it is also quite plain from the well-known history of electric utilities in this country generally over many decades that the service has grown and has grown not only in relation to population growth but has grown in relation to utilization per customer. Through improved engineering approaches such as through the economies of scale, through technological improvements and otherwise these operations have been such as to make it possible to contain the growth of the labor cost to a rate not as rapid as that of the public demand for the service, so that over the years—and there are many sources of indisputable accuracy, particularly in the annual publications of the Federal Power Commission on the subject, which will show a steady growth of the work force in this field over the decades.

Now, what has happened in 1974 in terms of a management decision of a need to reduce work force is accordingly somewhat novel, and raises the question of construing the agreement with EEOC, recognizing that at the time it was made the current 1974 conditions may not have been foreseen. This in turn raises the question whether the application of the

provisions of the collective bargaining agreement in respect to layoffs by seniority would bring about a frustration of the purposes of the parties to the EEOC agreement, even though that specific contingency was not dealt with in the formulation of the program.

It appears to the Court that this is the kind of situation like that dealt with in a number of reported decisions involving union locals and international unions, that it may have been what is called an essential implied condition. In New Jersey the lead cases are *International Union* v. *Becherer*, 142 N.J. Equity 561 (Court of Chancery), affirmed 4 N.J. Super. 456 (Appellate Division).

Another one is Edwards v. Leopoldi, 20 N.J. Super 43 (Appellate Division, 1952).

The Court has commentend that it sees no need to take up either now or at later stages of the case, unless other reasons appear to make it necessary, whether there was or was not discrimination in hiring or in other conditions of employment prior to the making of the EEOC agreement. The reason for this should be obvious to anyone familiar with the history of the efforts made under the Civil Rights Act to achieve its purposes. The most constructive of those efforts have been those based on efforts of this kind. In some instances they have been undertaken spontaneously, not only by particular employers but also by groups of employers in an area working through some local community organization or civil organization or other group of that type. The

object has been carried to the point far beyond what any statute on the books requires, such as the setting up of training schools and providing the necessary training where needed to match individuals seeking employment with the openings that are available, and where they lacked the necessary skills.

An affirmative action program with a target some five years later is the kind of thing whose purpose would be utterly frustrated if in a situation of the kind now faced here, the layoffs were to be effectuated solely in accordance with the seniority clause. This does not mean that a seniority clause in and of itself is discriminatory. On the contrary, everything that the Court has been able to find indicates that such clauses are inherently valid. The difficulty is in its application in the context of the affirmative action program which has been developed through the EEOC contract, that it would have a frustrating effect, and even though it might not be discriminatory the act of frustration calls for construction of a seniority clause in the collective bargaining agreement which would make it possible to carry forward the objectives of both agreements to the fullest extent possible. This requires an accommodation of their provisions.

At this stage the Court feels it can go no further than to make that ruling, namely, that to the extent that application of the seniority clause would substantially reduce the relative percentages of those whose hiring is the purpose of the EEOC agreement, it would be in frustration of it, and in violation of

it. The parties to the collective bargaining agreement are also parties to the EEOC agreement, and to the extent that under the current circumstances the provisions of the two are found to be inconsistent the EEOC agreement is to prevail.

Now, that determination is a partial declaratory judgment. There are other questions open which the Court does not feel can be dealt with at this stage, but the determination is to be made by the parties in attempting to devise a formula or a methodology for executing layoffs in a manner consistent with this ruling, and the Court would like guidance from the parties as to further processing, because under the controlling principles an action of this kind may be and probably should be expedited. The Court is under that direction.

This means the parties cannot afford the luxury of extensive and detailed discovery motions up and down the line. The purpose of the declaratory judgment is to resolve controversies as effectively and as expeditiously as possible. In making this ruling the Court does not intend to limit the authority or jurisdiction of any administrative agencies involved, but until such time as they act and take a position, this ruling is intended to control.

Now, are there any views as to how to proceed from here?

MR. COHEN: Your Honor, I do have a question. I would assume that your Honor is going to be answering an interlocutory order of some sort.

THE COURT: That is substantially it. Yes. I see no need for any restraints. I would assume that responsible private parties and government officials would be expected to abide by the ruling. If they do not, of course, there will be time enough for other remedies.

MR. COHEN: What I was going to ask the Court is, in view of the nature of the matter, we would request the Court to permit direct appeal to the Third Circuit. I don't have the title in front of me.

THE COURT: I know. That's all right.

MR. COHEN: 1228.

THE COURT: I would have no difficulty with that request because the Court finds nothing in point on this question.

MR. COHEN: Thank you.

I would then in conjunction with that—and I can represent to the Court that an appeal would be taken forthwith.

THE COURT: I would assume that would be true either way.

MR. COHEN: I would request a stay of the interlocutory order until such time as we can have the matter determined by the Court of Appeals or until such time as the Court of Appeals would determine otherwise. The matter is—the reason is this, your Honor, I assume that whatever affirmative order your Honor would enter, whatever interlocutory order, the company right now is in the process of laying off, so far in accordance with seniority.

THE COURT: I understand.

MR. COHEN: And it is obviously going to be many, many different jobs that will be affected by your Honor's ruling. The exact number we cannot determine. What the superseniority, whatever it be called, for the purposes of your Honor's decision, we cannot yet determine, but there will be an awfully large number of jobs affected.

THE COURT: Right.

MR. COHEN: And without—it's going to obviously have an effect on how the layoffs be continued or whether employees must now be brought back and other employees now laid off.

THE COURT: I think in that regard it would be appropriate to make clear, and this might well be included in the order, that there is certainly no intention that layoffs be effectuated in some precise mathematical fashion at every stage.

I gather that the layoff process involves a series of steps to effectuate it, and the operation of the seniority clause in and of itself requires a certain number of steps or stages in order to find out what effect it is going to have in terms of numbers, so that there may be—there may well be, for example, a selection by the employer of an office or some other unit involving perhaps 25 or 50 people which could be run through this process. It would only be at the end of the whole program of layoffs that the Court intends that the end results be such as to reasonably approximate the percentages that existed at the time that the process began, which is what? July 27?

MR. COHEN: July 27.

THE COURT: And there I think, too, that the parties should realize that the achievement of exact percentages is probably impossible under any system. In the first place employees come in complete units. You can't have 1.45 people. You've either got one or two, so there are going to be distortions for that reason alone, and other unavoidable conditions will undoubtedly result in some variation from theoretically ideal proportions on that basis, and the Court would be inclined to suggest that a deviation either way not greater than 15 per cent of the theoretical ideal would have to be regarded as acceptable by anybody taking a rational attitude on it. That is a pretty good result in any program, but it would be only at the end.

In other words, I don't visualize that anybody laid off now would have to be recalled if the fact be that at the end of the whole process the actual numbers of both groups are approximately at the levels of July 27.

MR. COHEN: Your Honor, it is because of the large degree—the difficulty as a practical matter of dealing with people bumping into these various positions at the point of the layoff that we are requesting the Court, so that we don't have all these interim problems, to stay the effect of the order, your Honor.

THE COURT: I would only stay it long enough for the Court of Appeals to decide on the stay pending the appeal.

MR. COHEN: All right.

And I would assume your Honor will certify the matter to the court.

THE COURT: It is the kind of question that ought to be, unless anybody has a different view. It is quite novel, and I think the parties—everybody is entitled to have good answers.

MR. CONNOR: I don't know that this is directly on that point, but I am inquiring at this time since your Honor's opinion from the bench dealt almost exclusively, if not exclusively, with the Title Seven remedies, whether we are in or out, if you will, speaking for GSA.

THE COURT: I intended to refer to your clients when I said that nothing in the opinion was intended to preclude any of the government agencies from carrying out their normal functions. When, as and if they should take a position, as long as they are parties to the case, the time is ample then to consider then whether the complaint should be supplemented to bring in that element.

MR. CONNOR: You don't intend—

THE COURT: There is no need to restrain your clients or any governmental agency from doing anything that they feel they are obliged to do under this statute.

I also said that I expected that private parties and governmental officials, employees, would probably not need instructions in the period during which the ruling controls and there has not been any action. I would anticipate that no agency would bring compliance complaints or any other sort of needless collateral litigation while this key question is decided. If that should happen then it will be time enough to consider whether or not there should be a restraint, so I don't deal with the question at this stage other than to express that point of view.

MR. CONNOR: Did your Honor intend to indicate that the executive order also requires the relief you are affording?

THE COURT: I do think that the basic theme of the complaint does show a justification for getting a clear answer.

Now, the United States of America is not a favored suitor any more than anybody else in this court, and people who have to deal with the government and have to deal with more than one agency when confronted with problems that they are wholly unable to have resolved without serious risk, are entitled to have the Court take up those issues and give them a clear, simple answer, and bind everybody that might otherwise take conflicting positions.

Now, what that is going to mean at such time as your clients may take some action I can't tell, but I think your clients are proper parties.

MR. CONNOR: We are still in the case?

THE COURT: You are still in.

MR. CONNOR: You are not then at this time making a holding under the executive order?

THE COURT: No. You have not done anything. You have not taken any position. I don't know whether you will or not.

MR. CONNOR: Agreed. Thank you.

THE COURT: Now, what about time schedules? The Court is starting a trial calendar next week, so this is going to involve some juggling in any event, but from the general standpoint what thoughts are there about further processing?

MR. APRUZZESE: Well, if your Honor feels—

When can we finish going through the whole four hundred?

VOICE FROM COURTROOM: It will probably be another three weeks.

THE COURT: I am talking primarily I think in terms of how much time it would take for the parties to develop some approach or some methodology to try to carry out this construction of the contract and distribute it and have some views.

MR. APRUZZESE: Well, if your Honor please, we will immediately go to work on the number of people we have already identified. We have already identified 176. Mr. Hayes says that for the additional people to be laid off the entire bumping process—let me put it this way: The process we will have to use now in layoff to approximate—to either meet or approximate with no less than a deviation of approximately 15 per cent the percentages we had on July 27, I think we will be able to do that with regard to the 176 very quickly. We will get to work on that tomorrow.

As the others develop we will give everyone the information that we have.

I would like to suggest, your Honor, that as soon as we have enough data that we proceed on a two-

track basis, we would immediately notify all the interested parties and try to arrange a meeting, and then report to the Court directly. The reason I say two-track basis, is that perhaps to conserve the time of the Court we would have this information all compiled. We would notify everyone. Hopefully we could meet within 24 or 48 hours, whatever the parties agree upon.

I think that would be in order, and then we could get back to the Court so that as we move along in this process, hopefully, we might be in accord, and the Court would be aware of what we are doing.

THE COURT: All right.

Now, of course, the key item is to try to develop ways to achieve the purposes consistent as much as possible with both agreements. This may mean setting up—I don't know—three seniority lists, one for minorities, one for females, and one for all others, and this will bring you back, I promise you, to the question the Court raised earlier as to where you put the white females and where you put a black female on the seniority list, separate seniority list. They can only go on once. You may have to alternate. I don't know. You will have to work out something.

Yes?

MR. COHEN: What I have doubt as to, what I think the problem is coming down to, the practical side of bumping has been explained.

THE COURT: I know.

MR. COHEN: It is impossible to know in advance where the bumping process takes an employee to. That is why I am not sure. I realize what your Honor is saying and I appreciate what your Honor is saying. I am not sure what type of a system your Honor is suggesting.

THE COURT: I don't know. I don't know as much about it as you do, but I would suggest that you consider some rule such as that if a person is on the list and has seniority over another and the person he would bump is a minority or a female, and those groups are already below by 15 per cent where they should be, then he can't bump, some kind of a rule like that.

You will have to use your ingenuity. You know more about it than I do. You can allow bumping if it doesn't unduly disrupt the percentages we are talking about, and you can't if it does.

Whether through the initial layoff or through the bumping, the net effect is the same.

MR. COHEN: Would this have been implemented before the matter is certified to the Court of Appeals?

THE COURT: Oh, no, not so far as I am concerned.

So far as I am concerned an order can be drawn on the basis of today's ruling, not on the implementation. I think the question that you will want an answer on is today's ruling first.

MR. APRUZZESE: In the interim—

THE COURT: Go ahead and work on what you are doing. Go ahead and report back on what progress you make.

MR. APRUZZESE: And Mr. Cohen, as I understand it, will not only appeal to be heard on the basis of the order but will probably seek a stay.

THE COURT: With the certification I told him I would grant him a stay long enough to apply to the Court of Appeals for a stay. I am not going to pass on that issue beyond giving him an opportunity to apply, but that should not delay the work of trying to set up a system for implementing. The two can run side by side.

MR. APRUZZESE: May I ask the Court what is the Court's feeling with regard to the time that the Court would require when we report back on any progress we are making?

THE COURT: There is no point in my trying to set a time, because we don't know what it is going to involve.

MR. APRUZZESE: It could be a long process. I forgot the information Mr. Hayes and Mr. Laver gave me that to arrive at the original 56 people who were to be laid off on a strict seniority basis the company had to have 386 interviews of all the various people affected, because it is company policy and always has been, and the union expects it, that each employee is told what his rights are, his insurance rights and severance and so on and so forth, and they are given a period of time to bump and so on.

THE COURT: You now have a new element introduced, I suppose, through the vesting provisions of the pension law signed last week.

MR. APRUZZESE: Well, it's going to be like the football draft.

THE COURT: How will that show up on the balance sheet? Has the accountant decided yet?

MR. COHEN: There is one thing. I am not sure whether your Honor has found as a matter of fact —just so I can know when the matter will be going to the Court of Appeals—is your Honor finding that the affirmative action program set forth in the conciliation agreement, which I know I contended to the Court that that is a hiring procedure, which goes over a period of time—

THE COURT: That is the mechanism. Hiring was the mechanism through which a certain goal was to be obtained with an expectation that things would remain the way they were, namely, that the work force each year would be somewhat higher than the year before, and that increase coupled with the turnover would give enough to work with through hiring to bring these percentages up.

If they are going to have layoffs by seniority the company will probably not have any chance of reaching where they were on July 27 before the five years are up.

Now, in order to accommodate both objectives EEOC may have to be happy with stabilizing for the time being at the July 27 levels, because once there are layoffs, even though the seniority clause

has to be adjusted to prevent deteriorating those percentages, the recalls come before new hires. You are not going to have any new hires until everybody who has been laid off has been recalled, assuming they want the jobs back, so what you are going to have is, if everybody is successful, and if nothing goes wrong, at best the leveling off of the affirmative action program for some period unknown at about the July 27 level, because there is no way to do hiring when you are laying off.

MR. COHEN: Do I also understand that the Court's jurisdiction insofar as rendereing this decision is not to be deemed its jurisdiction under Title Seven?

THE COURT: Its jurisdiction as I understand it is under the declaratory judgment act.

MR. COHEN: Well, affirmatively I wasn't sure whether your Honor was indicating that he was trying this as a matter—

THE COURT: I don't see basically that Title Seven is involved at all. Title Seven has provisions by statute of general application. Those provisions through the administrative arm that Cogress has created, namely, the EEOC, which has brought those general principles to detailed application in the case of this employer.

There is no need to look at the statute. You have got a contract. You have got two contracts, and the objective of one is in conflict with the objective of the other, and the conflict has not to be resolved. That is what declaratory judgment relief is about.

MS. JENKINS: Your Honor, do you intend to prepare a formal order in this matter?

THE COURT: Well, I normally look to counsel to do that.

Do you anticipate any difficulty? You are going to want a transcript, I assume, before you draw it.

MR. APRUZZESE: Yes, sir, as soon as possible.

I will endeavor to draw an order, and of course circulate it to my adversaries and see if we can all agree. If we don't agree I would solicit their earnest cooperation to get to the Court as quickly as possible—

THE COURT: Agreement only as to form.

MR. APRUZZESE: Yes, sir.

THE COURT: What time scale do you visualize?

MR. APRUZZESE: Just as soon as possible. We will start working on it anyway.

THE COURT: Is a week from tomorrow enough time to get a draft out?

MR. APRUZZESE: I would say so.

THE COURT: I am going to suggest a draft for everybody no later than next Friday, and anybody who has any objective to the draft should submit their version of the particular language directed to the Court with reasons within one week after receipt, and I will settle the form of the order. Otherwise we will spend longer settling the form of the order than the case would take to try.

MR. APRUZZESE: There is one other matter I would like to bring to the attention of the Court, and it is simply this, I realize there are no restraints in-

volved in this order. I also realize that the test of whether the company complies with the order would be a test that would be applied after the entire lay-off process is over, so that at any given point it might be that we might not be in strict conformity with the order, but that some point down the road we might get in conformity.

The point I want to raise, however, is that because of the nature of how difficult it is to follow the seniority process and the bumping process, and because of the added difficulty that will arise by trying to pass over, or, if you will, not lay off a given minority person, this will have an effect on the bumping process. It will be much different than we have already gone through for example, so that having gone through 176 employees, or having identified them through normal seniority, that whole picture is going to change now because within that 176 there are quite a few minority people, and if we decide that some of those should not be laid off then the 176 already identified might not be 176. It might be 100, because then we have to go through the whole process again.

The point I am trying to make is that this takes a tremendous amount of time.

Now, the company is in a posture—the best way I can describe it is to compare it to someone who is bleeding profusely, and they must apply a tourniquet, otherwise they are going to bleed to death, and if the company doesn't get some people off its payroll it's going to become financially insolvent.

Unfortunately, we do not have the luxury of time to go through these various processes and all that is required to identify the particular people and so on, and in certain respects I am fearful that it is almost going to take a looking back, if you will, because if we are to help the company in terms of its financial plight, we have to get some people out the door, and if we have to take all of these things into consideration it's going to be extremely difficult to make them all mesh in proper fashion so that the entire layoff is completed and we end in complete compliance with the current order.

What I am really saying is that it is going to be quite a juggling act, and it may be imperative for the company to get certain people off the payroll and to comply with the order it may be necessary—and I don't know, I am only speculating—and I hate to see this happen—have somebody off the payroll and call him back, but somebody has to go. Otherwise we won't have a layoff of 400. Then we're going to be talking of 800, and it is just a situation where we have to cut our losses, and that has been the difficulty with this situation since the beginning.

When we sat down and talked to any of the government agencies or submitted information to the Court, it was just impossible to come up with the names and faces as quickly as you would like, because the process doesn't lend itself to that type of a solution, and I know, because when the company told me this and the personnel people told me this and the lawyers in my office told me, I said, "Come on, don't

tell me it could be that hard, let's go up there and sit down," and now I believe it is that hard, so what I am really saying to the Court is that in order to get some people off the payroll and also to comply with the order and to give as much credence as we can to the collective bargaining agreement and as much credence as we can to the conciliation agreement, we really have our work cut out for us, and I just almost feel from the standpoint of where we are going to be when it is all over that some body is going to take a good shot at us and have a pretty good target, because it may very well prove to be a rather impossible task.

THE COURT: I would think that even though it may be complex, and even that it may take a little time, if you come out about where you are supposed to there should not be any question. You will be exposed to some risk of a kind which is probably worse than you were describing if you went through each program without this method, and you would have accomplished absolutely nothing if you were wrong, so the dilemma we hope will be minimized through the partial remedy given now.

MR. APRUZZESE: My whole point, your Honor, in making that statement, I was concerned because our vice president in charge of personnel said that, "Listen, we have to lay off some people," and my understanding of your Honor's order is you are going to stay the application of your order only pending the effort by Mr. Cohen to get a stay from the Third Circuit, or have them act on that.

THE COURT: There is no order signed yet, and there won't be one for perhaps ten days. No. I think it has to be two weeks. I am giving you to next Friday, and everybody else another week, so there is nothing to stay for two weeks, which means you have no remedy for two weeks.

MR. APRUZZESE: Right.

THE COURT: After that, if it takes a week to get a ruling from Philadelphia on a stay pending appeal, you are looking at three weeks, so you should know at the end of three weeks or so whether you have got a stay pending appeal.

MR. APRUZZESE: But in the meantime we are going to take action and lay off people and we will do so as best we can with a view towards what—

THE COURT: The important thing I think is that if we recognize that everybody who is a party to this suit, while he may have different views, certainly is not involved to the point of trying to make a difficult problem more difficult.

MR. APRUZZESE: Right.

THE COURT: I have seen nothing to suggest any lack of desire to reach a sound solution other than that which is natural from having different objects or different points of view, and the expectation is that this ruling as to the construction of the contract will provide a basis, whatever the views of any parties may have been, on which greater headway can be made than when you are still arguing what the contracts meant.

MR. COHEN: Do I understand that the company then should be going ahead in terms of layoffs?

THE COURT: I can't tell them whether to lay off or not.

MR. COHEN: I mean to continue.

THE COURT: That is what management is for.

MR. COHEN: And attempting also at the same time—attempting to comply with your Honor's view of the matter and—

THE COURT: I can't answer that. I can't say. What I told counsel for the company is there is no order signed yet. When there is one signed I take it you are going to and I will grant you a stay until you go to Philadelphia, so it won't be until Philadelphia tells you whether there is a stay pending appeal that you will know what rules you are working under.

That doesn't preclude your preparing on all sides. It will take this long to set up a system, won't it?

MR. COHEN: Unfortunately, I'm not sure—I agree with your Honor.

THE COURT: Yes.

I don't think anybody will be losing any unnecessary time.

MR. COHEN: Without any disrespect to your Honor, in terms of the decision, I do point out we had not argued the point as to the law governing the collective bargaining agreement. Had I known that was on your Honor's mind I would have pointed out that the law governing this collective bargaining agreement I believe is federal law, not state law. This is governed under 29 USC Section 185.

THE COURT: To the extent of that statute, but not for all aspects of contract law.

MR. COHEN: As a matter of fact all matters of contract law are governed under contracts between the labor organization and the employer engaged in interstate commerce, are governed under 29 USC Section 185. It's the federal common law Section 301 as it is commonly known.

THE COURT: On that matter there is no question but the Court has jurisdiction.

MR. COHEN: Oh, yes, yes.

THE COURT: Any other comment or suggestion?

(No response.)

THE COURT: All right.

A. 2.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MEMORANDUM, SEPTEMBER 23, 1974

Civil Action No. 74-1083

JERSEY CENTRAL POWER & LIGHT COMPANY,
a New Jersey Corporation, PLAINTIFF,

vs.

LOCAL UNIONS 327, ETC. ET ALS., DEFENDANTS.

MEMORANDUM

This memorandum supplements the oral opinion of September 5, 1974.

Territory Served.

This is larger than described at the hearing. It includes the area served by N. J. Power & Light Co., which merged into the employer on July 31, 1973. The added area includes the counties of Sussex, Warren and Hunterdon, the western part of Morris, and segments of Passaic, Mercer and Somerset. The new map submitted is marked Exh. J-1, and the added areas are the Northern and Western Divisions.

Financial situation; need for layoffs.

The annual reports, prospectuses and rulings of the state regulatory agency confirm the view ex-

pressed on September 5, 1974 that the adverse financial and economic trends developed in the Spring and Summer of 1974. No facts have been submitted by any party to suggest that the decision to effect layoffs was other than a good faith exercise of the judgment of management, faced with both those adverse trends and the effect of regulatory lag.

Extent of the ruling.

The ruling is a partial summary judgment, as appropriate under F.R.Civ.P. 56 (d). It does not terminate the action, F.R.Civ.P. 54 (b).

It deals only with the resolution of the conflicting provisions and objectives of the two separate agreements, both of which were adhered to by the employer and the Locals. The construction of these agreements avoids the frustration of the objectives of either the seniority clauses or of the affirmative action program, which would ensue if either were literally applied without regard to the other.

When the layoffs are completed, the ruling intends that minority employees and female employees are to constitute essentially the same proportion of the total work force as they did on July 27, 1974. A deviation which does not exceed 15% of those proportions, rounded out to the nearest whole individual (0.5 or more of an individual to be rounded up, and less than that rounded down), will not be considered significant. This requires the use of three seniority lists: one for minority employees, one for female employees, and one for "all other" employees. No

individual shall be counted more than once; i.e., an employee who is both minority and female shall be counted in the smaller, i.e., minority list, and not in the female list, for all calculations.

Status of GSA and OFCC.

These federal parties took the position that they had not taken any posture (either in this case or in any case) of the effect of layoffs on the applicability of Executive Order 11246, and did not know whether or not they would. Despite this, the remedy of declaratory judgment would be futile and frustrated unless these federal agencies were retained as parties and bound by the ruling, pursuant to F.R.Civ.P. 19 (a), and the disposition is intended to be binding on them.

This does not preclude either or both of them from taking a position on the question hereafter. If that should occur, it is to be prospective only, and if it differs from the ruling in this cause, its resolution will be dealt with in further proceedings here.

Stay pending appeal.

It was noted that the question would be certified for immediate appeal, in view of its novelty and importance. The request for stay pending appeal, however, raises more serious questions. If such a stay be granted, it is probable that the entire layoff process will have been completed under the seniority clause alone before the decision on appeal can be

expected. This would expose the employer to the risk of claims for back wages by minority and female employees for the period of the appeal, and thus frustrate the purpose of the remedy to that extent. Since the Locals seek the appeal, they ought to be committed to make the employer whole on back pay claims if a stay pending appeal is granted and if the appeal does not sustain the Local's position. Absent an appeal, the employer could properly adhere to the ruling here without that risk.

Since a stay pending appeal would have the effect indicated, this court feels it should not allow a stay for longer than needed to apply to the Court of Appeals for a stay pending appeal, and even that brief stay will be on the condition to indemnify and exonerate for the interim period if the Court of Appeals grants a stay on a like condition.

Union and Non-Union Employees.

The conflict between the collective bargaining agreement and the conciliation agreement which gives rise to the controversy obviously applies only to members of the Locals. The conciliation agreement applies to these employees and to probationary and non-union employees as well.

For this reason, the percentages to be adhered to in applying the order are those displayed for all employees, both as at July 27, 1974 and at completion of the layoffs. Those employees who are probationary, or who are not members of a local, are not

to be included in the three seniority lists and may be laid off or not without regard to seniority or seniority lists. They are to be included for the purpose of calculating their proportion, among all employees, at both the start and completion of the layoff process.

Since the layoff procedure is now under way and is not completed, the court does not at this stage include any ruling in regard to the future recall of employees laid off, whether or not they be members of the Local. That issue is not ripe for determination.

/s/ Vincent P. Biunno
VINCENT P. BIUNNO
U.S.D.J.

September 23, 1974

A. 3.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ORDER GRANTING PARTIAL SUMMARY JUDGMENT,
SEPTEMBER 23, 1974

Civil Action No. 74-1083

JERSEY CENTRAL POWER & LIGHT COMPANY,
a New Jersey Corporation, PLAINTIFF,

vs.

LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 and 1314 of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE UNITED STATES OFFICE OF FEDERAL CONTRACT COMPLIANCE, THE UNITED STATES GENERAL SERVICES ADMINISTRATION and THE NEW JERSEY DIVISION ON CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY, DEFENDANTS.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This matter having come on to be heard on September 5, 1974 on motion of plaintiff for summary judgment declaring the rights of the parties pursuant to Rule 56 of the Federal Rules of Civil Procedure and a crossmotion to dismiss the complaint having been made by the governmental defendants, General Services Administration and the Office of Federal Contract Compliance, Vincent J. Apruzzese,

Esquire of Apruzzese & McDermott appearing for plaintiff, and Edward A. Cohen of Franzblau, Cohen & Falkin, Attorneys appearing for defendant Local Unions 327, 749, 1289, 1298, 1303, 1309, 1314, International Brotherhood of Electrical Workers, and Terence G. Connor, Esquire, of the Department of Justice, appearing for defendants General Services Administration and Office of Federal Contract Compliance, and Issie L. Jenkins, Esquire, Associate General Counsel appearing for defendant Equal Employment Opportunity Commission, and no one having appeared on behalf of defendant the New Jersey Division On Civil Rights, Department of Law and Public Safety, and the court having considered the verified complaint, the answer of defendant Local Unions, affidavits, supplemental affidavits and briefs submitted, and having heard the argument of counsel and considered the conflicting positions advanced with regard to the proper layoff procedure to be followed by plaintiff in light of the seniority provisions of the collective bargaining agreement between plaintiff and defendant Unions and the provisions of the Conciliation Agreement effective December 3, 1973, as provided for in Sec. 706 Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5 and it further appearing that there is no genuine issue in this case as to any material fact necessary to this partial summary judgment, and that plaintiff is entitled to a declaratory judgment as prayed for in the complaint as a matter of law, and the court having rendered an oral opinion on September 5, 1974 and consistent therewith

and other good cause appearing, it is on this 23rd day of September, 1974

ORDERED that the motion of defendants General Services Administration and Office of Federal Contract Compliance to dismiss the action is denied because the court finds them to be necessary parties under Rule 19(a)(1) Federal Rules of Civil Procedure provided that this order in no way restricts these defendants in pursuit of their obligations pursuant to Executive Order 11246, and it is further

ORDERED that plaintiff's motion for summary judgment be and it hereby is granted to the extent set forth herein; as a partial summary judgment and it is further

ORDERED, ADJUDGED AND DECREED that in the effectuation of a layoff, the provisions of the aforesaid collective bargaining agreement and the Conciliation Agreement should be so construed as to give maximum effect to the objectives of each, provided, however, that the seniority provisions of the collective bargaining agreement cannot be construed in such manner as to frustrate the affirmative action commitments contained in the Conciliation Agreement; and it is further

ORDERED, ADJUDGED AND DECREED that where and to the extent that the provisions of the collective bargaining agreement and the Conciliation Agreement are found to be inconsistent, the Conciliation Agreement is to prevail; and it is further

ORDERED, ADJUDGED AND DECREED that, pursuant to this partial summary judgment, which is not a final judgment, layoffs are to be accomplished in such manner that upon completion the process shall substantially preserve the minority and female ratios which existed on July 27, 1974; provided, however, that any necessary deviation from such ratios shall not exceed fifteen (15%) percent rounded to whole individuals; and it is further

ORDERED, ADJUDGED AND DECREED that the authority or jurisdiction of any defendant governmental department or agency is not otherwise limited by this Order; and it is further

ORDERED, ADJUDGED AND DECREED that the parties shall confer as necessary with regard to the method, schedules, formulas and procedures to be utilized in complianec with this order, and; any party may move to dissolve, enlarge, modify the provisions hereof or to seek the further guidance of the court upon 5 days notice served upon counsel for the other parties, and the court shall retain jurisdiction of this cause for such purpose or for such other purposes as may be necessary and proper; and it is further

ORDERED, ADJUDGED AND DECREED that the Oral Opinion of September 5, 1974, and the Memorandum of the Court, of even date herewith, supplementing the same, shall constitute the court's findings of fact and conclusions of law, and that the

argument of the parties on any appeal to the Court of Appeals shall be deemed to have been advanced to this Court at the hearing on the matter. To the extent that such arguments have been submitted on informal application for reconsideration, the application is denied; and it is further

ORDERED, ADJUDGED AND DECREED that as this Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and it further appearing that an immediate appeal may materially advance the ultimate termination of this litigation, pursuant to 28 U.S.C. 1292 (b), defendants shall have leave to file an expedited appeal to the United States Court of Appeals for the Third Circuit, and this Order shall be, and it hereby is, stayed pending a determination of said court as to whether the stay shall be continued until its decision on the merits is rendered.

The stay so granted by this court is on the condition that the party or parties seeking the stay shall be obliged to indemnify and exonerate the plaintiff of and from any and all claims for reinstatement and back-pay made by any employee laid off during the effectiveness of the stay who is found to have been improperly laid off at the final determination of the appeal.

Done at Newark, New Jersey, this 23rd day of September 1974.

/s/ Vincent P. Biunno
VINCENT P. BIUNNO
U.S.D.J.

B. 1.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ORDER ON PETITION FOR REHEARING, MARCH 4, 1975

No. 74-2016

JERSEY CENTRAL POWER & LIGHT CO., APPELLEE,

v.

LOCAL UNIONS 327, ET AL.

LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309, and 1314 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, APPELLANTS.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by The United States Equal Employment Opportunity Commission, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for re-

hearing is denied. Judge Gibbons would grant rehearing by the court in banc.

By the Court,

/s/ [Illegible]
Judge

Dated: Mar. 4, 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 75-182

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

JERSEY CENTRAL POWER & LIGHT CO.; LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT, JERSEY CENTRAL POWER & LIGHT CO. IN OPPOSITION

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Decisions Below

The decision of the Court of Appeals is as indicated in the petition. The decision of the District Court, while officially unreported, appears at 8 Fair Employment Practice Cases 690.

Jurisdiction

The respondent does not question the chronology of events recited in the petition, nor does it question the statement of jurisdiction as set forth therein.

Question Presented

The petitioner's (Equal Employment Opportunity Commission) statement of the question is defective in two respects. The question it poses is whether layoffs, pursuant to a company-wide seniority system, which have a disparate impact upon minority employees, violate Title VII, Civil Rights Act of 1964, when that disparate impact is the direct result of the employer's post-1965 unlawfully discriminatory hiring practices? By asserting an unlawful post-1965 hiring practice under Title VII, petitioner assumes both facts and a conclusion which are not part of this record and which have not been established in any other proceeding. The second deficiency in the formulation of the issue, and one which follows from the first, is that petitioner disregards the significance to the issue of the most critical and distinctive element in this case, namely, the execution in December 1973 of a conciliation agreement by the petitioner Equal Employment Opportunity Commission (EEOC), Jersey Central Power & Light Co. (the company), and the involved unions

which completely settled any alleged past discrimination. Consequently, if the EEOC correctly stated the issue based upon the proceedings below, it would read: Whether layoffs, having a disparate impact upon minority employees, made pursuant to a collectively bargained, company-wide seniority system incorporated without change in an EEOC conciliation agreement, violate Title VII:

a) where there is no finding of post-Act discrimination; or

b) where allegations of post-Act discrimination have been settled by the conciliation agreement and any further EEOC action waived?

There are significant questions concerning estoppel and waiver in this proceeding which will have a major impact upon the litigants herein and are of great importance in the conciliation process of EEOC under the Act. Accordingly, if the court were to grant the EEOC petition, it is submitted that the following question should likewise be accepted for review.

> Did the Court of Appeals err by remanding the cause to permit evidence to be adduced by parties in the current litigation on the question of whether the company-wide seniority system was bona fide within the meaning of Section 703(h) of the Civil Rights Act of 1964, in light of its holding that the seniority system of the collective bargaining agreement had been incorporated by the EEOC in the conciliation agreement?

Because the foregoing question is considered so vital to the conciliation process it has been raised by the company in a cross-petition filed herein.

Statute Involved

In addition to the provisions of Title VII of the Civil Rights Act set forth in the petition, this case also involves the following provisions of the statute, set forth in relevant part.

Section 706(b), 42 U.S.C. § 2000e-5(b):

> "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."

Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1):

> "If . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent . . . named in the charge."

Counter-Statement of the Case

Petitioner's statement of the case is essentially correct with respect to those facts recited. However, it is an incomplete factual statement and inaccurately recites the holding below. Because the conciliation agreement is the distinguishing feature of this case, we first set forth its relevant particulars and then indicate the misreading of the decision below.

In January, 1972, a charge was filed by an EEOC Commissioner followed by a decision in January, 1973 wherein the EEOC concluded that there was reasonable cause

to believe the company had engaged and continued to engage in unlawful employment practices violative of Title VII. Among other indications, it specifically referred to post-Act discriminatory practices with respect to hiring and job assignments. Regarding hiring practices, the Commission relied upon statistical data similar to that set forth in its petition (at page 5) and concluded that in the absence of what it deemed an acceptable explanation by the company, race and national origin were the only identifiable factors explaining the disparity. While the charge was pending, the unions and the company, in the normal course, negotiated a new collective bargaining agreement which was executed in November, 1973 extending the very same seniority system that had existed theretofore. In December, 1973 a conciliation agreement, incorporating that company-wide seniority system, was entered into by the EEOC, the company and the involved unions providing in part as follows:

> "A charge having been filed under Title VII . . . said charge having been investigated and a decision having been rendered on the basis of the relevant facts, the parties hereby resolve and conciliate the matter as follows:
>
> *Section 1.*
>
> GENERAL PROVISIONS
>
> 1. It is understood that this Agreement does not constitute an admission by the respondents of any violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> . . .
>
> 3. *The Commission agrees not to sue the respondents over matters contained in this Agreement* subject to respondents' compliance with the

promises and representations contained herein. . . . (Emphasis added.)

4. This *waiver* by the Commission *extends to any matter which is covered by this Agreement.* . . . (Emphasis added.)

. . .

Section III.

RECRUITMENT AND HIRING PRACTICES

10. . . . The wages, benefits, other conditions of employment and seniority date of such employee [i.e., new hires] shall be determined in accordance with the provisions of the collective bargaining agreement.

. . .

Section IV.

PROMOTION AND TRANSFER

2. The respondents agree that within sixty (60) days after the signing of this Agreement, those male minority/females who are qualified and who had indicated the desire to transfer shall be given the opportunity to transfer, using their total length of Company service, subject to vacancies being available and in a manner consistent with the current collective bargaining agreement. For purposes of this Conciliation Agreement vacancies occasioned by lay off . . . shall not be considered as vacancies." (Petitioner's Appendix, pgs. 28-29, 45.)

The Court of Appeals, in determining the breadth of the conciliation agreement, concluded as follows:

"We regard the conciliation agreement as unambiguous in its requirements that an increased pro-

portion of females and minority group persons be hired, that once hired, workers in these classes be controlled by the terms and conditions of employment as set forth in the collective bargaining agreement. *Accordingly, we read the conciliation agreement as not modifying the promotion, transfer or layoff practices established by the collective bargaining agreement* . . . (Emphasis added.)

. . .

We thus interpret the conciliation agreement as being consistent with, rather than in conflict with, the collective bargaining agreement, *in that it incorporates the Company seniority system.*" (P.A. pgs. 44, 45-46. Emphasis added.)

Despite the foregoing, the EEOC, at page 7 of the petition, summarized the decision below, as follows:

"The panel unanimously held that the conciliation agreement was directed at new hires and did not cover layoffs. The two agreements, consequently, were not in conflict 'either by their express terms or by implication.' [Citation omitted].. We do not here question that holding."

The EEOC for the first time has thus abandoned its earlier contentions concerning conflict advanced in both the District and Circuit Courts below.

Clearly, the Court of Appeals found that the collective bargaining and conciliation agreements were not in conflict. But it is completely erroneous to state that the reason the court found no conflict was because the conciliation agreement related to hiring and "did not cover layoffs". The above excerpts demonstate just the opposite. The Court expressly found that the conciliation

agreement "*incorporates* the Company seniority system" without modification and it is for that reason that no conflict exists. This reading is critical to an understanding of the company's position.

ARGUMENT

A. The EEOC misreads the Title VII holding of the Court of Appeals.

The Company opposes the petition in its present form because it raises a Title VII issue which on the record below is purely hypothetical. A fair reading of the petition indicates that the EEOC is deeply concerned with what it regards as an improper construction of the Act, and in order to present that issue for review it has structured a set of "facts" from gleanings in the record which, on even the most superficial analysis, do not establish the necessary evidentiary base.

The EEOC reads the majority opinion to say that regardless of how flagrant an employer's hiring practices since the passage of the Act, Congress intended that a facially neutral company-wide seniority system should be insulated from attack even though a subsequent layoff pursuant to that seniority system would remove from the work force one whose hiring had been discriminatorily delayed and whose right to acquire seniority was to that extent denied. In short, a seniority system can be bona fide despite an unlawful hiring practice.

Contrariwise, the EEOC contends that any post-Act unlawful hiring practice infects the seniority system and *a fortiori* it cannot be bona fide. In short, both the practice and the seniority system must be remedied.

A facially neutral company-wide seniority system is a study in complete neutrality. Unlike other forms of seniority, it regulates employment rights, privileges and liabilities in a uniform manner for all those who have become employed, be they prior discriminatee or preferred white. The hiring practice is selective and may be discriminatory; the company wide seniority system has no discretion and, of itself, cannot discriminate. Unlike some departmental seniority systems or variations thereof, it has no "built-in head winds" which can on a continuing basis hamper the exercise of black employment rights while at the same time enhancing white employment rights. If there are specific employees who have in the past been subjected to hiring discrimination and who are now blindly laid off under the company-wide seniority system, they are not without remedy. But the remedy should fit the individual wrong by making whatever individual adjustments are necessary within the seniorty system. The remedy is not to discredit the entire system by declaring it to be less than bona fide and denying it any operational effect.

By analogy, the seniority system is the looking glass. If it is not distorted, it will reflect accurately what comes before it. Thus, if the seniority system is neutral and company-wide (the purest form), any employee given his rightful place will reflect equally as well as any other. Herein lies the difference in approach between the view of the court and the view of the EEOC.

If the EEOC complaint is considered in general terms, i.e., that the discriminatory hiring practice operated to the disadvantage of members of a particular class whose identities and numbers are unknown and the relief sought is neither coupled with individuals who have been wronged nor concerned with determining their identities, then, says

the court, such relief is not judicially authorized and recourse must be had to the legislative process.[1] Apparently, this latter situation is not what concerns the EEOC. It is troubled instead by the identifiable discriminatee who, never having had his wrong remedied, is again penalized by the employer's hiring practices when laid off. But as hereafter developed, that is not this case.

A second interpretation which may be reasonably placed upon the Court of Appeals decision requires recognition of the particular facts of this case. Rather than making a sweeping statement of law as characterized by the EEOC, the Court was simply reacting to the significance of the conciliation agreement. That agreement has been the centerpiece of this entire proceeding, and the court's comments must be related to it. Given proper effect, the conciliation agreement of 1973 constitutes a complete resolution and settlement of all charges relating to discriminatory employment practices, and particularly past hiring practices. The subject matter of the charges necessarily concerned only post-Act conduct. Thus, upon execution of that agreement, the company started with a fresh slate and was no longer subject to a charge by the EEOC that its hiring practices prior to the agreement were unlawfully discriminatory.[2] The EEOC could not at a later time reassert those charges for which it had negotiated a settlement, nor could the court, in search-

[1] This approach is basically the one followed by the Fifth Circuit in *Watkins* v. *United Steelworkers of America, Local 2369,* 516 F.2d 41, (1975).

[2] The court was careful to observe: "What we decide here can obviously affect and bind only the parties present in this litigation." (P.A. pg. 62.)

ing for an answer in the declaratory judgment proceeding, disregard that settlement. Thus, when it confronted the Title VII issue, it did so in the context of the conciliation agreement. In holding a facially neutral company-wide seniority system to be bona fide even though it operates to the disadvantage of females and minority groups, the court is implicitly saying that it could reach no other conclusion where the question of past practice has been foreclosed by a conciliation agreement which remedied all alleged impropriety. In short, in this context there was no past discrimination, after the passage of the Act, which the seniority system could perpetuate.

If either of the interpretations above is correct, the concern expressed by the EEOC is unfounded.

B. There has been no finding of any past discrimination.

In the presentation of its argument, the EEOC states that the statistical data on the composition of the company's work force indicates a *prima facie* case of past hiring discrimination, and further states its belief that, unlike other decided cases, this case "may present" the situation of post-Act unlawful discrimination which is perpetuated by a company-wide seniority system (Petition, pages 9, 12). As its argument progresses, these tentative statements of belief give way to outright declarations of fault. The EEOC describes two kinds of "victims of Jersey Central's post-1965 hiring discrimination": first, those "who applied to the company but were *unlawfully* rejected", and second, those "who were in the labor market and would have applied but for Jersey Central's reputation as a discriminatory employer" (Petition,

page 16. Emphasis in original). It is argued that the company-wide seniority system here "is founded on" these elements of unlawful post-1965 discrimination, and that its maintenance perpetuates such discrimination. Such a seniority system, maintains EEOC, cannot therefore be bona fide within the meaning of Section 703(h), and consequently a program of layoffs pursuant to that system having a disparate impact upon minorities is a violation of Title VII. If this were a valid thesis, it is one wholly irrelevant here. The essential predicate of unlawful post-Act hiring discrimination is absent.

There has been no finding in any forum that the company unlawfully rejected any applicant or that the company had a reputation for discrimination which thereby deterred potential applicants. There has been no finding that one or more of those employees laid off in 1974 had been discriminated against at an earlier time. Finally, there has been no finding or contention that the company-wide seniority system was adopted or maintained with an intent to discriminate or that the "differences" flowing from its operation, i.e., disparate impact, are "the result of an intention to discriminate." (Section 703(h)). The District Court expressly declined to explore the topic of discrimination prior to the conciliation agreement (Supp. App. pgs. 2-3). In the Court of Appeals, the majority opinion observed:

> "We are not concerned here with allegations or proof that the Company's plant-wide seniority system is by its express terms and intent presently discriminatory. Nor are we concerned with any charges or proofs that this plant-wide seniority system, which is facially neutral, was intended and

> designed to disguise present discriminatory practices.[52]

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[52] Other than the Company affidavits (see note 51, supra), the record is completely silent as to proof or assertions that discriminatory employment practices exist or that the seniority provisions are not bona fide."

Moreover, the court concluded that the hiring statistics contained in the company's affidavits did not establish unlawful discrimination (P.A. p. 53, n. 51).

Notwithstanding the above state of the record, the EEOC now asserts as fact post-Act, unlawful discrimination by the company. In order to make its "perpetuation" theory tenable, the EEOC *must find* some past discrimination for a "suspect" seniority system to carry forward. In earlier court decisions, this essential element was, typically, pre-Act conduct, not unlawful under Title VII, but nonetheless found or admitted to be discriminatory.[3] While at one point (Petition, page 11) the EEOC appears to contend that merely a discriminatory effect, produced by the seniority system and without business justification, is sufficient to establish a Title VII violation under the *Griggs* v. *Duke Power Co.* test,[4] a further reading clarifies that the EEOC position requires that the present objectionable effects be traceable to prior unlawful discrimination. This theory has been articulated by the EEOC in a recent decision:

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[3] E.g. *Quarles* v. *Phillip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968) excluding blacks from "white" jobs; *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974) petitions for certiorari pending, Nos. 74-1064, 74-1350, a total exclusion of blacks from the relevant work force.

[4] 401 U.S. 424 (1971).

> "It is the combination of past discrimination and its reflection in the seniority system which renders the seniority system not bona fide." Decision 75-251, 10 FEP Cases 1405, n. 4 at 1408 (May 8, 1975).

For purposes of this case, the EEOC appears to concede that a company-wide seniority system does not lose its bona fide character under Sec. 703(h) if it perpetuates pre-Act discrimination, but it urges that post-Act discrimination nullifies this defense. In the instant case, the only evidence recited for alleged post-Act discrimination is the statistical analysis from 1966 forward. Yet, the EEOC acknowledges that this indicates only a "prima facie case of hiring discrimination". (Petition pages 9-10). And that prima facie claim was expressed as "reasonable cause" in the EEOC's 1973 decision against the company. However, no finding of fact or conclusion of law resulted because the entire matter was conciliated and settled. Obviously, if past discrimination is needed to obtain "its reflection in the seniority system" to render the system not bona fide, the complete settlement of such alleged past discrimination must of necessity leave the system bona fide.

The EEOC suggests that this case "may present" for the first time the opportunity to disqualify a company-wide seniority system on the basis of post-Act discrimination. It distinguishes *Watkins* v. *United Steel Workers of America, Local No. 2369,* 516 F.2d 41 (5th Cir. 1975) on the ground that the employer ceased its discriminatory exclusion of blacks upon or before the effective date of Title VII. The attempted distinction is a misreading of the case. In *Watkins,* suit was brought under 42 U.S.C. 1981, as well as Title VII. Under the former

statute, the effective date of Title VII is of no significance in determining the propriety of an employer's conduct. The court upheld the company-wide seniority system against a claim it perpetuated past discrimination in a layoff situation. Regardless of the employer's pre-1965 policy of excluding blacks from its work force, the court said, the seniority system did not perpetuate discrimination as to those blacks laid off in 1971. Hired in 1968 and 1969, under a policy which no longer excluded blacks, they had not been victimized by that earlier practice, but instead had at all times been allotted their "rightful place" within the seniority system. The pre-1965 exclusion of blacks, though not within the reach of Title VII, would be proscribed by Section 1981, but that unlawful practice did not impair the bona fides of the seniority system when it operated to layoff junior blacks who had suffered no prior discrimination. Applied to the EEOC theory in the instant case, *Watkins* holds that layoffs pursuant to a facially neutral company-wide seniority system "founded on" a prior unlawful, discriminatory hiring practice are not themselves unlawful absent a finding of prior discrimination as to those laid off. And of course, there has been no proof or finding in the instant matter that this company's past practice was unlawful or that one or more of those laid off was an earlier victim of such alleged practice. Finally, as in *Watkins,* there is no contention that the seniority system is the result of an intention to discriminate. Indeed, it would be most inconsistent for the EEOC to so urge for, as the court below found, EEOC *incorporated* that system in its conciliation agreement.

C. The EEOC is estopped from asserting that the seniority system herein is not bona fide.

The EEOC has completely abandoned its earlier contentions that the conciliation agreement has primacy over the collective bargaining agreement and that layoffs according to the company-wide seniority system are in violation of the conciliation agreement. It does not question the Court of Appeals holding on that issue (Petition, pg. 7). In fact, it has put aside all consideration of the conciliation agreement and in so doing asks this Court to do the same. As indicated earlier, the EEOC theory requires two elements: post-Act discrimination and a seniority system which carries forward discriminatory effects. The company's position is that the EEOC is foreclosed from establishing either element by the conciliation agreement.

Behind the conciliation agreement lay charges and a determination of reasonable cause that post-Act hiring discrimination had occurred. The charge and determination were based on inferences drawn from hiring statistics similar to those set forth here by the EEOC. After extensive negotiations, the company agreed to a wide-ranging affirmative action program, including a five year good-faith effort to raise the minority and female workforce up to parity as openings for new hires occurred, offers of employment to alleged discriminatees, a given hiring rate in order to arrive at the percentages set forth within the five years goals, a training program for minorities so that they could become qualified applicants for entrance into the permanent workforce; and finally the company also agreed to pay in excess of $300,000 to alleged discriminatees. In return, the EEOC agreed not to sue the company over any matter contained in the

conciliation agreement and it also agreed to incorporate a non-admissions clause on behalf of the company. The company-wide seniority system was known and understood by all throughout these negotiations and was incorporated in the conciliation agreement without change. It contines in the same form.

The parties agreed that the wages, benefits, other conditions of employment and *seniority date* for new hires would be determined in accordance with the provisions of the collective bargaining agreement (Sec. III, Par. 10 of conciliation agreement).[5] The parties also agreed that the seniority system would be relied upon as a criterion for minorities/females who were qualified and interested in transferring to a different job assignment (Sec. IV, Par. 2 of conciliation agreement).[6] The EEOC had proposed that minority and female employees be given artificial seniority for job selection and transfer purposes. It later withdrew that proposal and as a result there was no modification of the seniority system (P.A. p. 31, n. 20).

The final agreement was an acceptable resolution to the EEOC and accordingly it relinquished its statutory right to institute a civil action. 42 USC § 2000e-5(f)(1). The result of that proceeding was in perfect harmony with the Congressional scheme. A principal policy of the original Act and one continued by the 1972 amendments is the elimination through "conference, conciliation and persuasion" of alleged unlawful employment practices. 42 USC § 2000e-5(b). This policy is considered sufficiently important that failure to provide an opportunity for con-

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[5] See pg. 6, *supra*.

[6] Id.

ciliation is cause for dismissal of a subsequent suit by the EEOC.[7] Obviously, for the policy to succeed, one must be able to rely on agreements reached. As the EEOC itself observed in its brief to the Court of Appeals:

> "Notwithstanding the compromises, the essential nature of the agreement remains constant: the Commission would not exercise its authority to sue; in return, the Company and Union promised to bring their practices into compliance with Title VII, in the manner outlined in the conciliation agreement.
>
> "The resultant conciliation agreement is clearly a contract binding on the 3 parties subject to judicial enforcement . . ." (page 21)

In a remarkable about-face, the EEOC now contends that the seniority system cannot be deemed bona fide because it is founded upon and perpetuates post-Act unlawful discrimination. The practices referred to are those covered by the Commissioner's charge which the EEOC later resolved to its satisfaction and for which resolution it relinquished its right to sue. The company contends that its hiring practices were not in violation of Title VII and there is no contention that the company has failed to comply with the terms of the conciliation agreement. Whatever alleged taint that may have attached to any earlier practices has been legally absolved and, assuming continued compliance, has been absolved with finality so far as the EEOC is concerned. With respect to the seniority system, there never was any con-

[7] *EEOC* v. *Westvaco Corp.*, 372 F.Supp. 985 (D.C. Md. 1974); *EEOC* v. *Hickey-Mitchell Co.*, 507 F.2d 944 (8th Cir. 1974).

tention and there is none now that this system, viewed in isolation, is bad. Operating like a computer, the system simply accepts what it is fed and produces a programmed result. The vice, if any, arises from its application to victims of unlawful discriminatory practices of the past. The past practice aspect, here foreclosed, is indispensible to the notion that the seniority system perpetuates past discrimination. Patently, standing alone, the seniority system is bona fide. And more important, this particular seniority system has already passed the scrutiny of the EEOC, is specifically relied upon by the EEOC and other parties to the agreement in determining the transfer rights of employees thought to have been previously disadvantaged, and, concludes the Court of Appeals, has been incorporated without modification into the conciliation agreement.

Having agreed that the seniority date for all new hires would be determined in accord with the provisions of the collective bargaining agreement, the EEOC now contends that layoffs of those recently hired employees, dictated by their seniority dates, violates Title VII. Having agreed that the seniority system had sufficient virtue to identify opportunities for transfer, the EEOC now contends that the same seniority system is not bona fide when it identifies employees for layoff. Having remedied the hiring practice to its satisfaction, including monetary payments to a number of alleged discriminatees, the EEOC in effect now contends that it is not satisfied and ignores that remedy in order to advance the former practice as discriminatory and thus fatal to the seniority system. The company here insists upon compliance with the EEOC waiver which EEOC agreed "extends to any matter which is covered by this Agreement". (Section I, Paragraph 4 of the conciliation agreement.)[8]

[8] See pg. 6, *supra*.

The law is clearly against the EEOC efforts here. In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court's comments on the question of waiver by an individual of his Title VII rights clearly anticipate and preclude the EEOC attempt here.[9] Decisions to the same effect are *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir., 1975); *U.S.* v. *Allegheny-Ludlum Industries*, —— F.2d —— (5th Cir. No. 74-3056, August 18, 1975), 11 FEP Cases 167, 174-175; *Williamson* v. *Bethlehem Steel Corp.*, 468 F. 2d 1201, 1203-04 (2d Cir. 1972), cert denied 411 U.S. 931; *Manning* v. *General Motors Corp.*, —— F.Supp. ——, 3 FEP Cases 968, 969-971 (N.D. Ohio 1971). Most appropriate here is a brief reference to an EEOC decision:

> "The purpose of a conciliation agreement is to settle the issues the parties raised at that time . . . In the context of a compromise and settlement, 'full satisfaction of all claims' refers to prior controversies on which the compromise arises." (Decision 74-119, April 26, 1974, 8FEP Cases 701).

Once EEOC is estopped from attacking this seniority system, there is no cause of action arising from the 1974 layoffs even though a disparate impact on minorities occurred.

D. The EEOC is estopped from attacking the bona fides of the seniority system herein.

The very same reasons that preclude the EEOC from asserting that the company's seniority system is not bona

[9] 415 U.S. at ——, 94 S. Ct. at 1021, n. 15.

fide also operate to estop it from attacking that system's bona fides before the District Court under the color of a remand from the Court of Appeals. That court ordered a remand for further proceedings, as may be required, consistent with its opinion. The EEOC construes that remand to mean it is entitled to an evidentiary hearing to examine into the bona fides of the seniority system, i.e., was it adopted with a design or intent to discriminate. However, if the court indeed meant that, it clearly committed error because this ignores the principles of estopped and waiver.

A complete exposition of the company's reasons on this point is set forth in its cross-petition which argument we ask be incorporated herein by reference.

Such a permissible course, i.e., further attack upon settled matters by the EEOC in the District Court would totally undermine the conciliation process. Because it is of such importance to the meaning and effect of that process, the company has raised this issue in its cross-petion filed herein.

CONCLUSION

For the foregoing reasons it is respectfully urged that the petition of EEOC be denied. In the event the petition is granted, we respectfully request that the error commited by the court below by remanding the cause for an evidentiary hearing likewise be reviewed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-182

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

JERSEY CENTRAL POWER & LIGHT CO.; LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

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BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

The opinions below and the basis of this Court's jurisdiction are accurately set out at pp. 1-2 of the Petition. However, the question presented there does not in fact arise in this case, the statutory materials

reproduced are incomplete and the statement of the case is insufficient to place this matter in proper context. Accordingly, we feel it necessary to restate the materials contained at pp. 2-8 of the Petition.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether, when there is no proof that a provision in a collective bargaining contract providing for layoff on the basis of plant-wide seniority was designed to disguise discriminatory practices, and no proof of any post-1965 unlawfully discriminatory hiring practices, and the Court of Appeals determines that the collective bargaining contract is consistent with an EEOC conciliation agreement, that Court erred in reversing summary judgment requiring that layoffs be made on a preferential racial basis contrary to the terms of the contract.

STATUTE INVOLVED

In addition to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* (the "Act"), reproduced at pp. 2-4 of the Petition, § 703(j), 42 U.S.C. 2000e-2(j), is also pertinent. It provides:

> "(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist, with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

COUNTERSTATEMENT OF THE CASE

Jersey Central Power and Light Company is a public utility which supplies electrical power to consumers in all or part of thirteen counties in the State of New Jersey. For approximately 30 years, the operating, clerical and maintenance employees of the Company have been represented by respondent Local Unions 327, 749, 1289, 1298, 1303, 1309 and 1314, International Brotherhood of Electrical Workers, AFL-CIO (hereinafter, the "Locals" or the "Unions"). Of the Company's total work force of some 3,900 employees, approximately 2,900 are represented by the Unions under a single collective bargaining agreement with the Company. It is uncontroverted that the Company "is solely responsible for hiring" (Appendix to the Petition, hereinafter "Pet. App.", 30, n. 18). Over the years, long predating passage of the Act, the collective bargaining agreements between the Unions and the Company have contained layoff and recall provisions based on company-wide seniority. Layoffs are based on a "last hired, first laid-off" basis, subject only to the ability to perform available work.

Following the filing of charges with EEOC against the Company and the Unions, and a reasonable cause determination that the Company was discriminating against minorities and females with regard to hiring

and certain other employment practices,[1] conciliation meetings were held between EEOC, the Company and the Unions. In January 1974, a written conciliation agreement was entered into by all parties, effective December 3, 1973. The principal provisions of the conciliation agreement, which are set forth at length in the opinion of the court below (Pet. App. 28-30, 43-45), are as follows: (1) a nonadmission provision under which the Commission agreed that the execution of the conciliation agreement did not constitute admission by the Company or Unions of any violation of Title VII; (2) the establishment of an affirmative action hiring program by the Company; (3) a commitment by the Commission not to sue the Company or the Unions over matters covered by the conciliation agreement; and (4) the incorporation within the conciliation agreement of the company-wide seniority system established in the collective bargaining agreement; specifically, it was provided that all conditions of employment, including "the seniority date" of employees hired under the affirmative action program "shall be determined in accordance with the provisions of the Collective Bargaining Agreement." (Pet App. 45)

Between January and July 1974, pursuant to its obligations under the affirmative action provision of the conciliation agreement, the Company hired a number of minority employees who, like all other employees in the bargaining unit, were credited with company-wide seniority from the date of their hire. In July

[1] The only reasonable cause finding against the Unions was that they had allegedly violated Title VII by virtue of being party to a collective bargaining agreement containing a discriminatory maternity benefit provision (Pet. App. 28, n. 16).

1974, because of economic conditions, the Company announced that a layoff of employees would be instituted. It was the Unions' position that such layoff should be conducted under the seniority-layoff provisions of the collective bargaining agreement, *viz,* that the most recently hired employees would be the first to be laid off. The Commission, on the other hand, argued that the Company would violate the provisions of the conciliation agreement and Title VII if it laid off in accordance with the collective bargaining agreement, since the layoffs on that basis would affect the most junior employees including the minority employees recently hired under the Company's affirmative action hiring program.

The Company then brought an action seeking a declaratory judgment concerning its obligations under the conciliation agreement, the collective bargaining agreement and Title VII. Shortly thereafter, the Company commenced its layoffs pursuant to the provisions of the collective bargaining agreement (Pet. App. 34). Two weeks later, while the layoffs were in process, the District Court granted partial summary judgment directing the Company to "deviate" from the company-wide seniority provision of the collective bargaining agreement to lay off more senior white employees to whatever extent was necessary to preserve the same ratio of minority employees as had existed prior to the layoffs (Pet. App. 36). Pursuant to 28 U.S.C. Section 1292(b), an interlocutory appeal was taken to the court below, which stayed the order of the District Court pending appeal, to allow the layoffs to continue under the terms of the collective bargaining agreement, and expedited the appeal. The layoffs were then concluded on the basis of the com-

pany-wide seniority system in the collective bargaining agreement (Pet. App. 36).

On January 30, 1975, the Court of Appeals rendered its decision, reversing the District Court. The Court of Appeals concluded, as a matter of ordinary contract law, that the conciliation agreement was "unambiguous" in requiring that once employees were hired, they would "be controlled by the terms and conditions of employment as set forth in the collective bargaining agreement" (Pet. App. 44). Accordingly, the Court of Appeals "interpret[ed] the conciliation agreement as being consistent with, rather than in conflict with, the collective bargaining agreement, in that it incorporates the Company seniority system" (Pet. App. 45-46).[2] EEOC does not question that holding here (Pet. 7).

The court below then turned "to the question of whether an overriding public policy dictates a modification of the collective bargaining agreement" (Pet. App. 49), specifically, whether a provision requiring the layoff of employees in accordance with a system of company-wide seniority was unlawful under the Act. After a review of the pertinent legislative history and case law under Title VII, the Court of Appeals concluded that on the record here, the District

[2] The Court of Appeals took note, *inter alia*, of the uncontradicted affidavit of Edward Semoneit, President of the Unions' bargaining council, to the effect that EEOC had sought during negotiations for the conciliation agreement a seniority system which would have given minority group and female employees greater seniority than they would actually have had under the collective bargaining agreement, that the Unions opposed the proposal and EEOC withdrew it, and that it was finally agreed that all employees would receive seniority in accordance with the terms of the collective bargaining agreement (Pet. App. 31, n. 20).

Court had erred in entering a summary judgment effecting such a modification. The court below held that a facially neutral company-wide seniority system which was neither designed nor intended to disguise discriminatory practices is a "bona fide" seniority system within the meaning of § 703(h) (Pet. App. 61, 55, n. 54). The Court of Appeals remanded the case with instructions to determine whether the company-wide seniority system in the collective bargaining agreement was *bona fide,* i.e., "neither designed nor intended to disguise discriminatory practices" and then, only if it was not, to take additional evidence "including, but not limited to past discriminatory employment practices." (Pet. App. 55, n. 54.) The Commission's application for rehearing, with a suggestion of rehearing, *en banc,* was denied by the Court of Appeals.

ARGUMENT

I

A. Since There Is No Proof of Post-1965 Unlawfully Discriminatory Hiring Practices, the Question Posed in the Petition Is Not Presented by This Case.

It is patent that the "Question Presented" by the Petition does not arise in this case. There is no evidence, much less a finding, that the Company was guilty of "post-1965 unlawfully discriminatory hiring practices which prevented minority group employees from accruing sufficient seniority to withstand the layoffs" (Cf. Pet. 2).[3] The District Court entered partial summary judgment for the Commission even though there was no proof of post-1965 unlawfully discriminatory hiring

[3] In its efforts to have this case appear to be something different from what it is, the Commission repeats its misstatement of the case throughout its Petition (see pp. 8, 11, 12, 14, 15).

practices; despite the fact that the Commission had entered into a conciliation agreement with the Company and the Union which included a nonadmission clause; and in the face of an affidavit filed by the Commission which stated in pertinent part that the EEOC did "not presently have information as to whether any of the employees who will be laid off or who have already been laid off were the actual victims of past discriminatory practices of plaintiff which the Conciliation Agreement seeks to remedy." (Pet. App. 24, n. 7.)

No amount of legerdemain can overcome the record and turn this into a case involving the question of the proper result to be reached when there is evidence of "post-1965 unlawfully discriminatory hiring practices" against identifiable individuals. Indeed, the Court of Appeals noted that, "we need not, and indeed could not, decide whether any different result would obtain in an action brought by an aggrieved party were the requisite burden of proof sustained . . . . What we decide here can obviously affect and bind only the parties present in this litigation." (Pet. App. 62) In short, the Court of Appeals expressly *refrained* from deciding whether, in the context of a complaint filed by an alleged victim of post-1965 hiring discrimination by the company, and proof of his charge, a layoff of the employee on the basis of company-wide seniority would violate Title VII.

B. The Instant Case—Arising "In An Unusual Procedural Context" (Pet. App. 21)—Does Not Warrant Review by This Court.

The Commission's Petition attempts to portray this case as one within the mainstream of Title VII litigation. But, the Court of Appeals was careful to note at the outset of its opinion that this case arises in an "un-

usual procedural context" (Pet. App. 21). First, as just explained, this proceeding is not one in which the District Court entered summary judgment for the defendants even though the Commission had proved "post-1965 unlawful discriminatory hiring practices." On the contrary, summary judgment was entered in favor of the Commission even though there was *no* such proof. Second, while the Commission now attempts to make this a case focusing on Title VII of necessity, it implicates a particular conciliation agreement, which was intended to resolve, *inter alia,* the charge of alleged hiring discrimination by the Company. A primary basis of the decision below therefore, was the proper interpretation of that agreement "according to the principles of general contract law" (Pet. App. 41). The threshold issue in the District Court and the Court of Appeals was whether there was a conflict between the conciliation agreement and the collective bargaining agreement. The Court of Appeals decided that there was no such conflict, and the Commission does not even contest that holding in this Court.

For both of the above-stated Reasons, this case does not present an appropriate vehicle for determining the question stated in the petition.

II

THE DECISION BELOW IS CLEARLY CORRECT AND IS IN ACCORD WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS WHICH HAVE RULED ON THE ISSUE ACTUALLY PRESENTED BY THIS CASE.

The decision of the court below, finding no violation of Title VII based on layoffs pursuant to a company-wide seniority system, where no post-1965 hiring discrimination was shown, is in accord with those of the

only other courts of appeals to rule on that issue. *Waters* v. *Wisconsin Steel Works,* 502 F.2d 1309 (7th Cir., 1974), petitions for certiorari pending, Nos. 74-1064, 74-1350; *Watkins* v. *United Steelworkers of America, Local No. 2369,* 516 F.2d 41 (5th Cir., 1975). Both the Fifth and Seventh Circuits held that Title VII does not authorize remedies for those who have not suffered discrimination under Title VII. Both have correctly drawn the line between "make whole" remedies which are required under Title VII to remedy discrimination against specific individuals (*Albemarle Paper Company* v. *Moody,* 43 L.W. 4880 (June 25, 1975)), and "preferential" remedies which would grant fictional seniority to individuals not discriminated against under Title VII. Thus, all three decisions rest on this Court's teaching in *Griggs* v. *Duke Power Company,* 401 U.S. 424, 431 (1971), that "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." And, as the painstaking analysis of the court below demonstrates (see Pet. App. 56-58), the instant decision, along with *Watkins* and *Waters,* clearly reflects the congressional intent underlying §§ 703(h) and (j) as stated in the Act itself and its legislative history.

Accordingly, as the Fifth Circuit concluded in its recent *Watkins* decision:

> "We hold that, regardless of an earlier history of employment discrimination, when present hiring practices are non-discriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid-off, and will be be rehired, adopted without intent to discriminate, is not a violation of Title VII or Section 1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination." 516 F.2d at 44-45.

The Commission seeks to distinguish the Fifth Circuit's decision in *Watkins* because no post-Act discrimination was shown there. However, there was no finding of post-Act discrimination in this case either. Moreover, the Fifth Circuit was clearly of the view that it had reached the same result on the same issue as the Third Circuit in the instant case (516 F.2d at 45.) Similarly, the Commission attempts to distinguish the Seventh Circuit's decision in *Waters* on the basis that the discrimination found there existed prior to passage of the Act. We again note only that there is no finding of any discrimination in this case, either before or after passage of the Act. Finally, the Commission states that the Fifth Circuit's decision in *Franks* v. *Bowman Transportation Company,* 495 F.2d 398 (5th Cir., 1974), *certiorari granted,* No. 74-728, is not in point. We agree that the issue in *Franks* is wholly different from that in the instant case. Indeed, the difference is significant, as *Franks,* unlike the case at bar, presents the sole issue of the scope of the remedy necessary to make whole an identifiable victim of post-Act hiring discrimination.

In sum, the Courts of Appeals which have faced the issue actually presented by this case have unanimously rejected the preferential approach urged by EEOC. Moreover, because of the context in which this case arises, *supra,* it does not represent an appropriate vehicle for review of even that issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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1. The issue which the Equal Employment Opportunity Commission has presented to this Court for review arises from the ruling of the court below that layoffs pursuant to a company-wide seniority system

which eliminate a vastly greater proportion of minority than other employees would not constitute a violation of Title VII even if it were shown that the disproportionate impact is the result of the employer's post-1965 discriminatory hiring practices. Respondent employer and the respondent union, whose collective bargaining agreements provide for layoff by company seniority, contend that the issue posed by the Commission is not presented in this case because there is not, in the record presently before this Court, any finding that the company did in fact engage in post-1965 discriminatory hiring practices. The point that we make in the petition, however, and the reason the issue is presented to this Court at this time is that the opinion of the Court of Appeals has precluded the Commission from developing the facts to show post-1965 discriminatory hiring practices. The majority of the Court of Appeals has held that proof "that past discrimination occurred and that the effects of such past discrimination are perpetuated by the present layoff practices under the current plant-wide seniority system" are "without probative value in challenging a bona fide seniority system" (Pet. App. 54). In so holding, the majority below drew no distinction between pre-1965 discrimination, which was not then regarded as unlawful, and post-1965 discrimination in hiring practices, which was manifestly unlawful under Title VII. It is precisely because the opinion of the court below holds immaterial

proof of post-act hiring discrimination that the issue should be reviewed now.[1]

2. Respondent employer also contends that the Equal Employment Opportunity Commission is estopped from asserting that the seniority system is not bona fide because it entered into a conciliation agreement with respondents which, the company now claims, incorporated the seniority system without change. The company obviously did not deem that the conciliation agreement had so clearly incorporated the seniority system when it took the initiative of instituting this action to resolve what it deemed to be possible conflicting claims under the conciliation agreement and the collective bargaining agreements. Nor did the Court of Appeals hold that the conciliation agreement incorporated the collective bargaining agreement in toto. The basic decision of the Court of Appeals was that "the two agreements are not in conflict either by their express terms or by implication" (Pet. App. 48). In support of this conclusion the Court of Appeals did point to certain provisions of the conciliation agreement which made reference to the collective bargaining agreement (Pet. App. 45). Paragraph 10 of Section III quoted in the opinion (Pet. App. 45) must be read in the context of the section where it appears. Paragraph 9 of Section

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[1] As we point out in our petition for a writ of certiorari (Pet. 9), there is, even in the present record, substantial statistical evidence to indicate that the Commission, if permitted to develop the facts, could show post-1965 discriminatory hiring practices.

III (quoted at Pet. App. 43) provides that respondent shall make a reasonable effort to recruit minorities and females into those "craft areas where such jobs are to be filled by new hires." Paragraph 10 then provides that persons hired into craft jobs after the effective date of the conciliation agreement are to be given credit for service elsewhere but that "[t]he wages, benefits, other conditions of employment and seniority date of *such* employee shall be determined in accordance with the provisions of the collective bargaining agreement." [Emphasis supplied]. And in ¶ 2 of Section IV, where the parties agree to give "affected class" members opportunities to transfer and to be promoted subject to vacancies being available, those transfers are to be made "in a manner consistent with the current Collective Bargaining Agreement." These references to the collective bargaining agreement are limited to certain select groups under special circumstances; they scarcely have the blanket effect which the respondent now imputes to them.

Aside from these limited references to the collective bargaining agreements with respect to craft positions and transfers, it is evident, particularly with respect to the affirmative action program, that the question of a general layoff was simply not within the contemplation of the conciliation agreement. The whole agreement proceeds on the assumption that the company would continue to have vacancies and would be engaged in new hires. As the Court of Appeals noted (ft. 39, Pet. App. 43), the district

court concluded that the specific contingency of layoffs by seniority was not dealt with in the formulation of the conciliation agreement. And the Court of Appeals itself noted, as "highly significant," that "the conciliation agreement contains no overall layoff procedure or seniority system." (Pet. App. 43).

The question whether the layoffs by this company in the context of its post-1965 hiring practices violates Title VII is thus a matter which was not within the scope of the conciliation agreement. Rather it is a new matter or practice which, under the express terms of the conciliation agreement (see Pet. App. 28-29), is not covered by the waiver of the right to sue incorporated in that agreement. Whether or not the layoffs violate Title VII, under the standard which we, in our petition for a writ of certiorari, have asked the court to adopt as proper, is of course a matter to be determined on the facts to be more fully developed before the district court without reliance on the conciliation agreement. The issue is here now because the respondent instituted the suit and made the Commission a party defendant. The proper standard by which that issue must be judged should be determined now because the Court of Appeals, in our view, has set forth an improper standard which will preclude the Commission from developing the relevant facts, not only in this suit, but in any future suit which it may be in a position to bring on behalf of the persons aggrieved by the layoffs. Since, as we discuss in the petition for a writ of certiorari, the issue is one of great significance, not only in this

case but in others, and since that issue is properly before this Court at this time as the result of the company's action in instituting suit for a declaratory judgment, we respectfully urge that our petition for a writ of certiorari be granted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Under Title VII of the Civil Rights Act of 1964 and Executive Order 11246, the Attorney General, the Secretary of Labor, and other branches of the federal government have responsibility for enforcement of federal laws providing for equal employment opportunities. The resolution of the issue presented in this case will affect that enforcement responsibility.

The petition for a writ of certiorari presents the question whether, under Title VII of the Civil Rights Act of 1964, it is an unlawful employment practice for an employer, who previously engaged in hiring discrimination after the enactment of Title VII, to effect layoffs of its employees pursuant to a facially neutral company-wide seniority system, when the layoffs have a disproportionate impact on the company's minority-group employees who were hired after the employer had ceased discriminating.

The position of the Equal Employment Opportunity Commission is that layoffs on the basis of seniority in those circumstances perpetuate the prior unlawful discrimination and are therefore barred by Title VII.

Although we differ with EEOC on the merits, we agree that the issue is of substantial current importance in the administration of Title VII and that it merits review by this Court.

1. In our view, layoffs of employees in the reverse order of their seniority, if made pursuant to the terms of an otherwise *bona fide* company-wide seniority system, do not "discriminate against any individual * * * because of such individual's race" (42 U.S.C. 2000e-2(a)) but rest on the racially neutral criterion of each individual's tenure with the company. So long as no affected individual's tenure is shorter than it would have been in the absence of the employer's prior unlawful discrimination—that is, so long as each individual who was himself the subject of discrimination is restored to his rightful place in the seniority system—the layoffs are protected by Section 703 (h) of the Act, 42 U.S.C. 2000e-2(h), which provides that "it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate because of race * * *."

If a particular employee was himself the victim of the company's prior unlawful hiring discrimination, then his seniority should be computed from the date when he would have been hired but for that discrimination. To subject him to layoff on the basis of his actual hiring date would perpetuate the prior unlawful discrimination against him and would not be protected by Section 703(h), because his

reduced seniority would be "the result of an intention to discriminate because of race" (*ibid.*).[1]

But the Act does not require giving black (or other minority-group) employees enhanced seniority rights on the basis of their race simply because *other* black applicants were previously denied employment on the basis of their race. Treating black employees differently for purposes of layoffs solely because they are black, when they have not themselves previously suffered individual discrimination by the employer, would amount to preferential treatment on the basis of race within the meaning of Section 703(j) of the Act, 42 U.S.C. 2000e-2(j).

2. While we thus disagree with EEOC's interpretation of the Act, we recognize that the issue it presents in its petition is of substantial importance in its current enforcement program. We believe that certiorari should be granted to resolve that issue.

Although the case was decided by the district court on a motion for summary judgment, so that the present record does not indicate whether or to what extent Jersey Central engaged in unlawful employment discrimination after the effective date of the 1964 Act, the court of appeals ruled that "proofs of this nature are without probative value in challenging a bona fide seniority system" (Pet. App. 54). Thus, the issue tendered by the petition, though presented in an abstract fashion, is ripe for review in this case, since

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[1]The issue whether retroactive seniority credit may be granted to the identifiable victims of an employer's unlawful hiring discrimination is before this Court in *Franks* v. *Bowman Transportation Co.*, No. 74-728. We do not understand the court of appeals' opinion in this case to foreclose such seniority credit for employees who were themselves unlawfully denied employment on the basis of their race at a time prior to their actual hiring.

its resolution will affect the conduct of further litigation.[2]

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[2]This case was initiated by Jersey Central's filing of a complaint seeking a declaration of its possibly inconsistent rights and obligations under its collective bargaining agreement with the unions, on the one hand, and, on the other hand, Title VII of the Civil Rights Act of 1964 and a conciliation agreement signed by the company, the unions, and the Commission. The district court granted partial summary judgment against Jersey Central on the ground that the conciliation agreement was inconsistent with and superseded the provisions of the collective bargaining agreement that provided for layoffs on the basis of seniority. The court of appeals held that the conciliation agreement is silent with respect to layoffs and does not affect the layoff scheme provided for in the collective bargaining agreement (Pet. App. 42-49).

The court of appeals also considered whether that scheme "*must* be modified as being contrary to [the] public policy" reflected in Title VII (*id.* at 50; emphasis in original). It concluded that "Congress did not intend that a *per se* violation of the Act occur whenever females and minority group persons are disadvantaged by reverse seniority layoffs" (*id.* at 52) and that, so long as the system "is facially neutral and was neither designed nor intended to disguise discriminatory practices" (*id.* at 55, n. 54), it "will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past [discriminatory] employment practices" (*id.* at 61).

The court of appeals contemplated further litigation in the district court in accordance with the principles stated in its opinion (see *id.* at 53, 55, n. 54, 62). We doubt that the district court could properly entertain what would amount to a Title VII suit in the context of an action for a declaratory judgment, because Title VII's enforcement scheme contemplates that litigation with respect to a particular employer's employment practices will be initiated by EEOC (or private complainants) and only after the prescribed administrative procedures—the filing of an administrative complaint, the giving of notice to the employer, the conducting of an investigation, a finding of probable cause by EEOC, and unsuccessful conciliation efforts—have been properly undertaken. EEOC, however, is undoubtedly a proper party to this case with respect to the contractual issues raised by Jersey Central's complaint, and its status as a party probably means

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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that it will be bound by the judgment as a matter of *res judicata*. See ALI, *Restatement of Judgments*, §77 (1942). And see Pet. App. 62.

Since the judgment of the court of appeals would at least arguably preclude EEOC from filing its own complaint against Jersey Central on the theory advanced in the petition for a writ of certiorari, we believe that the Commission may properly invoke this Court's certiorari jurisdiction notwithstanding the unusual procedural posture of this case.